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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1989

APRIL 18 THROUGH JUNE 3, 1990

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1989

FLORIDA *v.* WELLS

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88–1835. Argued December 4, 1989—Decided April 18, 1990

Following his arrest for driving under the influence of alcohol, respondent Wells gave the Florida Highway Patrol permission to open the trunk of his impounded car. An inventory search of the car turned up two marijuana cigarette butts in an ashtray and a locked suitcase in the trunk. The suitcase was opened, and a considerable amount of marijuana was discovered. After the state trial court denied Wells' motion to suppress the marijuana on the ground that it was seized in violation of the Fourth Amendment, he pleaded *nolo contendere* to a charge of possession of a controlled substance, but retained his right to appeal the denial of the motion to suppress. The intermediate appellate court held, *inter alia*, that the trial court erred in denying suppression of the marijuana found in the suitcase. The State Supreme Court affirmed, noting the absence of any Highway Patrol policy on the opening of closed containers found during inventory searches, and holding that *Colorado* v. *Bertine*, 479 U. S. 367, requires police to mandate either that all containers be opened during such searches, or that no containers be opened, leaving no room for discretion on the part of individual officers.

Held: Absent any Highway Patrol policy with respect to the opening of closed containers encountered during an inventory search, the instant search was insufficiently regulated to satisfy the Fourth Amendment. Requiring standardized criteria or established routine as to such openings prevents individual police officers from having so much latitude that inventory searches are turned into a ruse for a general rummaging in order to discover incriminating evidence. However, denying, as did

the State Supreme Court, police officers all discretion is at odds with *Bertine*. While an "all or nothing" policy is permissible, one that allows a police officer sufficient latitude to determine whether a particular container should be opened in light of the nature of the search and characteristics of the container itself does not violate the Fourth Amendment. Pp. 3–5.

539 So. 2d 464, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 5. BLACKMUN, J., *post*, p. 10, and STEVENS, J., *post*, p. 12, filed opinions concurring in the judgment.

Michael J. Neimand, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the brief were *Robert A. Butterworth*, Attorney General, and *Enoch J. Whitney*.

Huntley Johnson argued the cause for respondent. With him on the brief was *Fletcher N. Baldwin, Jr.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A Florida Highway Patrol trooper stopped respondent Wells for speeding. After smelling alcohol on Wells' breath, the trooper arrested Wells for driving under the influence. Wells then agreed to accompany the trooper to the station to take a breathalyzer test. The trooper informed Wells that the car would be impounded and obtained Wells' permission to open the trunk. At the impoundment facility, an inventory search of the car turned up two marijuana cigarette butts in an ashtray and a locked suitcase in the trunk. Under the trooper's direction, employees of the facility forced open the suitcase and discovered a garbage bag containing a considerable amount of marijuana.

Wells was charged with possession of a controlled substance. His motion to suppress the marijuana on the ground that it was seized in violation of the Fourth Amendment to the United States Constitution was denied by the trial court.

He thereupon pleaded *nolo contendere* to the charge but reserved his right to appeal the denial of the motion to suppress. On appeal, the Florida District Court of Appeal for the Fifth District held, *inter alia*, that the trial court erred in denying suppression of the marijuana found in the suitcase. Over a dissent, the Supreme Court of Florida affirmed. 539 So. 2d 464, 469 (1989). We granted certiorari, 491 U. S. 903 (1989), and now affirm (although we disagree with part of the reasoning of the Supreme Court of Florida).

The Supreme Court of Florida relied on the opinions in *Colorado* v. *Bertine*, 479 U. S. 367 (1987); *id.*, at 376 (BLACKMUN, J., concurring). Referring to language in the *Bertine* concurrence and a footnote in the majority opinion, the court held that

> "[i]n the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance." 539 So. 2d, at 469.

According to the court, the record contained no evidence of any Highway Patrol policy on the opening of closed containers found during inventory searches. *Ibid.* The court added, however:

> "The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion." *Ibid.*

While this latter statement of the Supreme Court of Florida derived support from a sentence in the *Bertine* concurrence taken in isolation, we think it is at odds with the thrust of both the concurrence and the opinion of the Court in that case. We said in *Bertine:*

> "Nothing in [*South Dakota* v.] *Opperman*[, 428 U. S. 364 (1976),] or [*Illinois* v.] *Lafayette*[, 462 U. S. 640 (1983),] prohibits the exercise of police discretion so long as that

> discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." 479 U. S., at 375.

Our view that standardized criteria, *ibid.*, or established routine, *Illinois* v. *Lafayette*, 462 U. S. 640, 648 (1983), must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime," *Bertine*, 479 U. S., at 376 (BLACKMUN, J., concurring).

But in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical "all or nothing" fashion. "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Id.*, at 372; see also *South Dakota* v. *Opperman*, 428 U. S. 364, 369 (1976). A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.

In the present case, the Supreme Court of Florida found that the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered dur-

ing an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment and that the marijuana which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida. Its judgment is therefore

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with the Court that the judgment of the Florida Supreme Court should be affirmed because the Florida Highway Patrol had *no* policy at all with respect to opening closed containers. As the majority recognizes, see *ante*, at 4 and this page, the search was therefore unconstitutional under any reading of our cases. See *Colorado* v. *Bertine*, 479 U. S. 367, 374 (1987) (opening closed container found in a vehicle during an inventory search constitutional only because policy mandated opening of such containers). Our cases have required that inventory searches be "sufficiently regulated," *ante*, this page, so as to avoid the possibility that police will abuse their power to conduct such a search. See *South Dakota* v. *Opperman*, 428 U. S. 364, 384 (1976) (Powell, J., concurring) ("[N]o significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope").

The facts of this case demonstrate a prime danger of insufficiently regulated inventory searches: police may use the excuse of an "inventory search" as a pretext for broad searches of vehicles and their contents. In this case, there was no evidence that the inventory search was done in accordance with *any* standardized inventory procedure. Although the State characterized the search as an inventory search in the trial court, it did not point to any standard policy governing inventory searches of vehicles (much less to any policy governing the opening of closed containers) until the case reached the Florida Supreme Court. At that time, which was after our

decision in *Bertine*, *supra*, the Florida Highway Patrol entered the case as *amicus curiae* and argued that Chapter 16 of the "Florida Highway Patrol Forms and Procedural Manual" contained the standard policy that guided the conduct of the search in this case. The Florida Supreme Court concluded that the manual did not provide any policy for the opening of closed containers. App. 256. But it now appears that the Florida Supreme Court may have been under the misapprehension that the manual was in effect at the time of the search in this case. See Tr. of Oral Arg. 30–31. The State conceded at oral argument before this Court that the manual was *not* in effect at the time of the search in this case, but argued nonetheless that the officer had performed the search according to "standard operating procedures" that were later incorporated into the Highway Patrol Manual. See *id.*, at 17 ("The rules and regulations which . . . came into effect shortly thereafter, merely codified what the Florida Highway Patrol was doing to all procedures *[sic]* during that period of time"). But the State did not offer any evidence at the suppression hearing to support a finding that Trooper Adams performed the inventory according to "standard operating procedures." Trooper Adams testified that he asked his immediate superior whether he should impound and inventory the car but that his superior left it to Adams' discretion, stating that he found nothing suspicious about the car. Trooper Adams testified that he "took it upon [himself] to go ahead and have the car towed." App. 88. He also testified that he thought that opening the suitcase was part of a proper inventory but that he did not ask anyone else's opinion until after the search was completed. *Id.*, at 82–83. He testified "Well, I had to take my chances." *Id.*, at 83.

In addition, there was no evidence that an inventory was actually done in this case: the State introduced neither an inventory sheet nor any testimony that the officer actually inventoried the items found in respondent's car. Tr. of Oral Arg. 5, 25–26. Rather, the testimony at the suppression

hearing suggests that the officer used the need to "inventory" as an excuse to search for drugs. The testimony establishes that after arresting respondent for driving under the influence of alcohol and accompanying him to the station house, Trooper Adams returned to the impound lot to conduct the inventory search at 1:30 a.m. Grover Bryan, who assisted the state trooper with the inventory, testified at the hearing that Trooper Adams told him that "he wanted to inventory the car good, he wanted to go through it real good because he felt that there was drugs in it." App. 141. According to Bryan, Adams' desire to inventory the car stemmed from the fact that there was a large amount of cash lying on the floor of the car when respondent was arrested. Bryan testified that Adams insisted that contraband would be found in the car because "[t]here ain't nobody runs around with that kind of money in the floorboard unless they're dealing drugs or something like that." *Id.*, at 142; see *ibid.* ("[H]e felt that the money that they had found was from a drug deal"). When they finally found the locked suitcase in the trunk, Bryan testified that Adams "want[ed] in the suitcase" because he "had a strong suspicion there was drugs in that car and it was probably in that suitcase." *Id.*, at 145. The men then spent 10 minutes prying open the lock on the suitcase with two knives. App. 82, 147. Bryan testified that once they opened the suitcase and found a bag of marijuana inside, "[Adams] was quite excited. He said 'there it is.'" *Id.*, at 147. See also Tr. of Oral Arg. 24 ("Well, to be quite frank, the officer as he got further and further along in his search, got hungrier and hungrier").

The majority finds it unnecessary to recount these facts because it affirms the Florida Supreme Court on the narrow ground, clearly established by *Opperman* and *Bertine*, that police may not be given total discretion to decide whether to open closed containers found during an inventory search. With this much I agree. Like JUSTICE BLACKMUN, *post*, at 11–12, however, I cannot join the majority opinion because it

goes on to suggest that a State may adopt an inventory policy that vests individual police officers with *some* discretion to decide whether to open such containers. See *ante*, at 4 ("A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself"). This suggestion is pure dictum given the disposition of the case. But as JUSTICE BLACKMUN notes, *post*, at 11, there is a danger that this dictum will be relied on by lower courts in reviewing the constitutionality of particular inventory searches, or even by local policymakers drafting procedures for police to follow when performing inventories of impounded vehicles. Thus, I write separately to emphasize that the majority's suggestion is inconsistent with the reasoning underlying our inventory search cases and relies on a mischaracterization of the holding in *Bertine*.

Our cases clearly hold that an inventory search is reasonable under the Fourth Amendment only if it is done in accordance with standard procedures that *limit* the discretion of the police. See *Opperman*, 428 U. S., at 384 (Powell, J., concurring). In *Bertine*, the Court held that the police may open closed containers found within an impounded vehicle only if the inventory policy mandates the opening of all such containers. See 479 U. S., at 374, n. 6 ("We emphasize that, in this case, the trial court found that the Police Department's procedures mandated the opening of closed containers and the listing of their contents"). Contrary to the majority's assertion today, *ante*, at 3, *Bertine* did not establish that police may exercise discretion with respect to the opening of closed containers during an inventory search. The statement in *Bertine* that "[n]othing in *Opperman* . . . prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria," 479 U. S., at 375, was made in response to an argument that the inventory search was unconstitutional because the police had some discretion to determine whether to *impound* the car. The Court's conclu-

sion that the opening of defendant's backpack was constitutional was clearly premised on the city's inventory policy that left no discretion to individual police officers as to the opening of containers found inside a car once it was impounded. See *id.*, at 374, n. 6. JUSTICE BLACKMUN's concurrence in *Bertine* could not be clearer: "[I]t is permissible for police officers to open closed containers in an inventory search *only if* they are following standard police procedures that mandate the opening of such containers in *every* impounded vehicle." *Id.*, at 377 (emphasis added).[1]

Opening a closed container constitutes a great intrusion into the privacy of its owner even when the container is found in an automobile. See *Arkansas* v. *Sanders*, 442 U. S. 753, 762–764 (1979); *United States* v. *Chadwick*, 433 U. S. 1, 13 (1977). For this reason, I continue to believe that in the absence of consent or exigency, police may not open a closed container found during an inventory search of an automobile. See *Bertine*, 479 U. S., at 387 (MARSHALL, J., joined by BRENNAN, J., dissenting).[2] In any event, in *Bertine*, the

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[1] Indeed, the majority's suggestion that police may be vested with discretion to open a container "in light of the nature of the search and characteristics of the container itself," *ante*, at 4, flatly contradicts the reasoning in *Bertine*. In that case, the Court rejected the argument that police are required to "weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items." *Bertine*, 479 U. S., at 374. The Court found such a rule unworkable for "'it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which container or items may be searched and which must be sealed as a unit.'" *Id.*, at 375, quoting *Illinois* v. *Lafayette*, 462 U. S. 640, 648 (1983); see also 479 U. S., at 375 ("We reaffirm these principles here: [a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront") (internal quotations omitted).

[2] The Court has recognized that an inventory search potentially can serve three governmental interests: protection of the owner's valuables, protection of the police from false claims of theft or damage, and protection

Court recognized that opening a container constitutes such a great intrusion that the discretion of the police to do so must be circumscribed sharply to guard against abuse. If the Court wishes to revisit that holding, it must wait for another case. Attempting to cast doubt on the vitality of the holding in *Bertine* in this otherwise easy case is not justified.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that the judgment of the Supreme Court of Florida is to be affirmed. If our cases establish anything, it is that an individual police officer cannot be given complete discretion in choosing whether to search or to leave undisturbed containers and other items encountered during an inventory search. See *Colorado* v. *Bertine*, 479 U. S. 367, 374, n. 6 (1987); *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). Here, given the complete discretion Florida Highway Patrol troopers enjoyed to open or not to open closed containers, the evidence in question properly was suppressed. I do not join the majority opinion, however, because, instead of ending the case at that point, it continues with language, unnecessary on the facts of this case, concerning the extent to which a policeman, under the Fourth Amendment, *may* be given discretion in conducting an inventory search.

The majority disagrees with the Florida Supreme Court's statement that a police department must have a policy which "mandate[s] either that all containers will be opened during

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of the police from danger. *South Dakota* v. *Opperman*, 428 U. S. 364, 369 (1976); *id.*, at 378 (Powell, J., concurring). The Court has concluded that routine inventory searches are constitutional because these government interests outweigh an individual's diminished expectation of privacy in a car. *Id.*, at 378–379 (Powell, J., concurring). I do not agree that these interests justify the opening of a closed container in which an individual retains a significant expectation of privacy. See *Bertine, supra*, at 382–387 (MARSHALL, J., dissenting). Indeed, I do not see how the treatment of the luggage in this case—prying open the lock with two knives—served any of these governmental interests.

an inventory search, or that no containers will be opened." *Ante*, at 3. The majority concludes that the Fourth Amendment does not impose such an "all or nothing" requirement. With this much I agree. A State, for example, consistent with the Fourth Amendment, probably could adopt a policy which requires the opening of all containers that are not locked, or a policy which requires the opening of all containers over or under a certain size, even though these policies do not call for the opening of all or no containers. In other words, a State has the discretion to choose a scheme that lies somewhere between the extremes identified by the Florida Supreme Court.

It is an entirely different matter, however, to say, as this majority does, that an individual policeman may be afforded discretion in conducting an inventory search. The exercise of discretion by an individual officer, especially when it cannot be measured against objective, standard criteria, creates the potential for abuse of Fourth Amendment rights our earlier inventory-search cases were designed to guard against. Thus, when the majority states that a "police officer may be allowed sufficient *latitude* to determine whether a particular container should or should not be opened in light of the nature of the search," and that it is permissible for a State "to *allow* the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors," *ante*, at 4 (emphasis added), the majority is doing more than refuting the Florida Supreme Court's all-or-nothing approach; it is opining about a very different and important constitutional question not addressed by the state courts here and not raised by the circumstances of the case. Although the majority's statements on the issue perhaps are to be regarded as no more than dicta, they nonetheless are problematic inasmuch as they may be taken out of context or misinterpreted by policymakers and trial courts. Because, as noted above, the complete discretion afforded Florida policemen in this case renders the search at issue

undeniably unconstitutional, I see no reason for the Court to say anything about precisely *how much, if any*, discretion an individual policeman constitutionally may exercise.

JUSTICE STEVENS, concurring in the judgment.

While I agree with JUSTICE BLACKMUN's opinion, I think additional criticism of the Court's activism is appropriate. One must wonder why this case merited a grant of certiorari. The judgment of the Florida Supreme Court was obviously correct. Its opinion contained a minor flaw, as countless opinions do. Unless we are to become self-appointed editors of state-court opinions in the criminal law area, that is surely an insufficient reason for exercising our certiorari jurisdiction.

The flaw, of course, might impose a stricter standard for the conduct of inventory searches in Florida than the Federal Constitution actually requires, but there is no suggestion that the extra layer of protection provided to Florida citizens by the Florida Supreme Court will hamper law enforcement in that State. Apparently the mere possibility of a minor burden on law enforcement interests is enough to generate corrective action by this Court.

But then, as JUSTICE BLACKMUN properly observes, the Court does not content itself with commenting on the flaw in the Florida Supreme Court's opinion. Instead, it plunges ahead with a flawed opinion of its own. While purportedly reaffirming the requirement of "standard criteria" to control police discretion in conducting inventory searches, see *Colorado* v. *Bertine*, 479 U. S. 367, 375 (1987), the Court invites the State to allow their officers discretion to open—or not to open—"closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors." *Ante*, at 4. Thus, luggage, briefcases, handbags, brown paper bags, violin cases—indeed, virtually all containers except goldfish bowls—could be opened at the whim of the officer, whether locked or unlocked. What is left for the "standard criteria"?

It is a proper part of the judicial function to make law as a necessary by-product of the process of deciding actual cases and controversies. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism.

NEW YORK *v.* HARRIS

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 88–1000. Argued January 10, 1990—Decided April 18, 1990

Police officers, having probable cause to believe that respondent Harris committed murder, entered his home without first obtaining a warrant, read him his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and reportedly secured an admission of guilt. After he was arrested, taken to the police station, and again given his *Miranda* rights, he signed a written inculpatory statement. The New York trial court suppressed the first statement under *Payton* v. *New York*, 445 U. S. 573, which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. However, the court admitted the second statement, and Harris was convicted of second-degree murder. The Appellate Division affirmed, but the State Court of Appeals reversed. Applying the rule of *Brown* v. *Illinois*, 422 U. S. 590, and its progeny that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality, the court deemed the second statement inadmissible because its connection with the arrest was not sufficiently attenuated.

Held: Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*. The penalties imposed on the government where its officers have violated the law must bear some relation to the purposes which the law serves. *United States* v. *Ceccolini*, 435 U. S. 268, 279. The rule in *Payton* was designed to protect the physical integrity of the home, not to grant criminal suspects protection for statements made outside their premises where the police have probable cause to make an arrest. *Brown* v. *Illinois*, *supra*, and its progeny are distinguishable, since attenuation analysis is only appropriate where, as a threshold matter, courts determine that the challenged evidence is in some sense the product of illegal governmental activity. Here, the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into his home. Cf. *United States* v. *Crews*, 445 U. S. 463. Suppressing that statement would not serve the purpose of the *Payton* rule, since anything incriminating gathered from Harris' in-home arrest has already been excluded. The principal incentive to obey

Payton still obtains: the police know that a warrantless entry will lead to the suppression of evidence found or statements taken inside the home. Moreover, the incremental deterrent value of suppressing statements like Harris' would be minimal, since it is doubtful that the desire to secure a statement from a suspect whom the police have probable cause to arrest would motivate them to violate *Payton*. Pp. 17–21.

72 N. Y. 2d 614, 532 N. E. 2d 1229, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 21.

Peter D. Coddington argued the cause for petitioner. With him on the briefs were *Robert T. Johnson*, *Anthony J. Girese*, *Stanley R. Kaplan*, and *Karen P. Swiger*.

Barrington D. Parker, Jr., by invitation of the Court, 492 U. S. 934, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief was *Ronald G. Blum*.*

JUSTICE WHITE delivered the opinion of the Court.

On January 11, 1984, New York City police found the body of Ms. Thelma Staton murdered in her apartment. Various facts gave the officers probable cause to believe that the respondent in this case, Bernard Harris, had killed Ms. Staton. As a result, on January 16, 1984, three police officers went to Harris' apartment to take him into custody. They did not first obtain an arrest warrant.

When the police arrived, they knocked on the door, displaying their guns and badges. Harris let them enter.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, *Michael R. Dreeben*, and *Robert J. Erickson*; for the Office of Prosecuting Attorney, Wayne County, Michigan, by *John D. O'Hair* and *Timothy A. Baughman*; and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Gregory U. Evans*, *Daniel B. Hales*, *George D. Webster*, and *Jack E. Yelverton*.

Once inside, the officers read Harris his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Harris acknowledged that he understood the warnings, and agreed to answer the officers' questions. At that point, he reportedly admitted that he had killed Ms. Staton.

Harris was arrested, taken to the station house, and again informed of his *Miranda* rights. He then signed a written inculpatory statement. The police subsequently read Harris the *Miranda* warnings a third time and videotaped an incriminating interview between Harris and a district attorney, even though Harris had indicated that he wanted to end the interrogation.

The trial court suppressed Harris' first and third statements; the State does not challenge those rulings. The sole issue in this case is whether Harris' second statement—the written statement made at the station house—should have been suppressed because the police, by entering Harris' home without a warrant and without his consent, violated *Payton* v. *New York*, 445 U. S. 573 (1980), which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The New York trial court concluded that the statement was admissible. Following a bench trial, Harris was convicted of second-degree murder. The Appellate Division affirmed, 124 App. Div. 2d 472, 507 N. Y. S. 2d 823 (1986).

A divided New York Court of Appeals reversed, 72 N. Y. 2d 614, 532 N. E. 2d 1229 (1988). That court first accepted the trial court's finding that Harris did not consent to the police officers' entry into his home and that the warrantless arrest therefore violated *Payton* even though there was probable cause. Applying *Brown* v. *Illinois*, 422 U. S. 590 (1975), and its progeny, the court then determined that the station house statement must be deemed to be the inadmissible fruit of the illegal arrest because the connection between the statement and the arrest was not sufficiently attenuated.

The court noted that some courts had reasoned that the "wrong in *Payton* cases . . . lies not in the arrest, 'but in the unlawful *entry* into a dwelling without proper judicial authorization'" and had therefore declined to suppress confessions that were made following *Payton* violations. 72 N. Y. 2d, at 623, 532 N. E. 2d, at 1234. The New York court disagreed with this analysis, finding it contrary to *Payton* and its own decisions interpreting *Payton*'s scope. We granted certiorari to resolve the admissibility of the station house statement. 490 U. S. 1018 (1989).

For present purposes, we accept the finding below that Harris did not consent to the police officers' entry into his home and the conclusion that the police had probable cause to arrest him. It is also evident, in light of *Payton*, that arresting Harris in his home without an arrest warrant violated the Fourth Amendment. But, as emphasized in earlier cases, "we have declined to adopt a '*per se* or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest." *United States* v. *Ceccolini*, 435 U. S. 268, 276 (1978). Rather, in this context, we have stated that "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *Id.*, at 279. In light of these principles, we decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.

Payton itself emphasized that our holding in that case stemmed from the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." 445 U. S., at 601. Although it had

long been settled that a warrantless arrest in a public place was permissible as long as the arresting officer had probable cause, see *United States* v. *Watson*, 423 U. S. 411 (1976), *Payton* nevertheless drew a line at the entrance to the home. This special solicitude was necessary because "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" 445 U. S., at 585 (citation omitted). The arrest warrant was required to "interpose the magistrate's determination of probable cause" to arrest before the officers could enter a house to effect an arrest. *Id.*, at 602–603.

Nothing in the reasoning of that case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. *United States* v. *Crews*, 445 U. S. 463, 474 (1980). Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk. For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible.

This case is therefore different from *Brown* v. *Illinois*, 422 U. S. 590 (1975), *Dunaway* v. *New York*, 442 U. S. 200 (1979), and *Taylor* v. *Alabama*, 457 U. S. 687 (1982). In each of those cases, evidence obtained from a criminal de-

fendant following arrest was suppressed because the police lacked probable cause. The three cases stand for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. See also *Wong Sun* v. *United States*, 371 U. S. 471 (1963). We have emphasized, however, that attenuation analysis is only appropriate where, as a threshold matter, courts determine that "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, *supra*, at 471. As Judge Titone, concurring in the judgment on the basis of New York state precedent, cogently argued below, "[i]n cases such as *Brown* v. *Illinois (supra)* and its progeny, an affirmative answer to that preliminary question may be assumed, since the 'illegality' is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement. In these cases, the 'challenged evidence'—*i. e.*, the post arrest confession—is unquestionably 'the product of [the] illegal governmental activity'—*i. e.*, the wrongful detention." 72 N. Y. 2d, at 625, 532 N. E. 2d, at 1235.

Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else. The case is analogous to *United States* v. *Crews*, *supra*. In that case, we refused to suppress a victim's in-court identification despite the defendant's illegal arrest. The Court found that the evidence was not "'come at by exploitation' of . . . the defendant's Fourth Amendment rights," and that it was not necessary to inquire whether the "taint" of the Fourth Amendment violation was sufficiently attenuated to permit the introduction of the evidence. 445 U. S., at 471. Here, likewise, the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into Harris' home.

We do not hold, as the dissent suggests, that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody. Statements taken during legal custody would of course be inadmissible, for example, if they were the product of coercion, if *Miranda* warnings were not given, or if there was a violation of the rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981). We do hold that the station house statement in this case was admissible because Harris was in legal custody, as the dissent concedes, and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else.

To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated. We are not required by the Constitution to go further and suppress statements later made by Harris in order to deter police from violating *Payton*. "As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.'" *United States* v. *Leon*, 468 U. S. 897, 910 (1984) (citation omitted). Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris' position, they need

not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*. As a result, suppressing a station house statement obtained after a *Payton* violation will have little effect on the officers' actions, one way or another.

We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*. The judgment of the court below is accordingly

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Police officers entered Bernard Harris' home and arrested him there. They did not have an arrest warrant, he did not consent to their entry, and exigent circumstances did not exist. An arrest in such circumstances violates the Fourth Amendment. See *Payton* v. *New York*, 445 U. S. 573 (1980); see also *ante*, at 16, 17. About an hour after his arrest, Harris made an incriminating statement, which the government subsequently used at his trial. The majority concedes that the fruits of that illegal entry must be suppressed. See *ante*, at 20. The sole question before us is whether Harris' statement falls within that category.

The majority answers this question by adopting a broad and unprecedented principle, holding that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Ante*, this page. The majority's conclusion is wrong. Its reasoning amounts to nothing more than an analytical sleight of hand, resting on errors in logic, misreadings of our cases, and an apparent blindness to the incentives the Court's

ruling creates for knowing and intentional constitutional violations by the police. I dissent.

I

In recent years, this Court has repeatedly stated that the principal purpose of the Fourth Amendment's exclusionary rule is to eliminate incentives for police officers to violate that Amendment. See, *e. g.*, *United States* v. *Leon*, 468 U. S. 897, 906 (1984). A police officer who violates the Constitution usually does so to obtain evidence that he could not secure lawfully. The best way to deter him is to provide that any evidence so obtained will not be admitted at trial. Deterrence of constitutional violations thus requires the suppression not only of evidence seized during an unconstitutional search, but also of "derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." *Murray* v. *United States*, 487 U. S. 533, 536–537 (1988) (citing *Nardone* v. *United States*, 308 U. S. 338, 341 (1939)); see also *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). Not all evidence connected to a constitutional violation is suppressible, however. Rather, the Court has asked "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Ibid.* (quoting J. Maguire, Evidence of Guilt 221 (1959)). Accord, *Brown* v. *Illinois*, 422 U. S. 590, 599 (1975); *Dunaway* v. *New York*, 442 U. S. 200, 217–218 (1979); *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982).

Because deterrence is a principal purpose of the exclusionary rule, our attenuation analysis must be driven by an understanding of how extensive exclusion must be to deter violations of the Fourth Amendment. We have long held that where police have obtained a statement after violating the Fourth Amendment, the interest in deterrence does not

disappear simply because the statement was voluntary, as required by the Fifth Amendment. See, *e. g.*, *Brown*, *supra*, at 601–602; *Dunaway*, *supra*, at 216–217; *Taylor*, *supra*, at 690. Police officers are well aware that simply because a statement is "voluntary" does not mean that it was entirely unaffected by the Fourth Amendment violation. See *Brown*, *supra*, at 601–602. Indeed, if the Fourth Amendment required exclusion only of statements taken in violation of the Fifth Amendment, the Fourth Amendment would serve no independent purpose. A regime that suppresses only *some* fruits of constitutional violations is a regime that barely begins to eliminate the incentives to violate the Constitution.

When faced with a statement obtained after an illegal arrest, then, a court will have occasion to engage in the attenuation inquiry only if it first determines that the statement is "voluntary," for involuntary statements are suppressible in any event. Attenuation analysis *assumes* that the statement is "voluntary" and asks whether the connection between the illegal police conduct and the statement nevertheless requires suppression to deter Fourth Amendment violations. That question cannot be answered with a set of *per se* rules. An inquiry into whether a suspect's statement is properly treated as attributable to a Fourth Amendment violation or to the suspect's independent act of will has an irreducibly psychological aspect, and irrebuttable presumptions are peculiarly unhelpful in such a context. Accordingly, we have identified several factors as relevant to the issue of attenuation: the length of time between the arrest and the statement, the presence of intervening circumstances, and the "purpose and flagrancy" of the violation. See, *e. g.*, *Brown*, *supra*, at 603–604.

We have identified the last factor as "particularly" important. 422 U. S., at 604. When a police officer intentionally violates what he knows to be a constitutional command, exclusion is essential to conform police behavior to the law. Such a "flagrant" violation is in marked contrast to a violation

that is the product of a good-faith misunderstanding of the relevant constitutional requirements. This Court has suggested that excluding evidence that is the product of the latter variety of violation may result in deterrence of *legitimate* law enforcement efforts. See *Leon*, *supra*, at 918–920. Underlying this view is the theory that officers fear that if their judgment as to the constitutionality of their conduct turns out to be wrong, the consequences of their misjudgments may be too costly to justify the possible law enforcement benefits. Any doubt concerning the constitutionality of a course of action will therefore be resolved against that course of action. Whatever the truth of that theory,[1] the concern that officers who act in good faith will be overdeterred is nonexistent when, based on a cynical calculus of the likely results of a suppression hearing, an officer intentionally decides to violate what he knows to be a constitutional command.

An application of the *Brown* factors to this case compels the conclusion that Harris' statement at the station house must be suppressed. About an hour elapsed between the illegal arrest and Harris' confession, without any intervening factor other than the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). This Court has held, however, that "*Miranda* warnings, *alone* and *per se*, . . . cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown*, *supra*, at 603 (citing *Westover* v. *United States*, decided with *Miranda* v. *Arizona*, *supra*, at 496–497). See also *supra*, at 22–23. Indeed, in *Brown*, we held that a statement made almost *two* hours after an illegal arrest, and after *Miranda* warnings had

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[1] This Court has never held that an officer's good-faith misunderstanding of the law justifies the admission of unconstitutionally seized evidence except in the limited context of the officer's good-faith and objectively reasonable reliance on a facially valid warrant issued by a neutral and detached magistrate. *United States* v. *Leon*, 468 U. S. 897, 925–926 (1984). Even in that limited context, I think that suppression is required. See *id.*, at 928–960 (BRENNAN, J., dissenting).

been given, was not sufficiently removed from the violation so as to dissipate the taint. 422 U. S., at 604.

As to the flagrancy of the violation, petitioner does not dispute that the officers were aware that the Fourth Amendment prohibited them from arresting Harris in his home without a warrant. Notwithstanding the officers' knowledge that a warrant is required for a routine arrest in the home,

> "the police went to defendant's apartment to arrest him and, as the police conceded, if defendant refused to talk to them there they intended to take him into custody for questioning. Nevertheless, they made no attempt to obtain a warrant although five days had elapsed between the killing and the arrest and they had developed evidence of probable cause early in their investigation. Indeed, one of the officers testifed that it was departmental policy not to get warrants before making arrests in the home. From this statement a reasonable inference can be drawn . . . that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strenthened their case with a confession. Thus, the police illegality was knowing and intentional, in the language of *Brown*, it 'had a quality of purposefulness,' and the linkage between the illegality and the confession is clearly established." 72 N. Y. 2d 614, 622, 532 N. E. 2d 1229, 1233–1234 (1988) (citation omitted).[2]

[2] The "restrictions on questioning" to which the court refers are restrictions imposed by New York law. New York law provides that an arrest warrant may not issue until an "accusatory instrument" has been filed against the suspect. N. Y. Crim. Proc. Law § 120.20 (McKinney 1981). The New York courts have held that police officers may not question a suspect in the absence of an attorney once such an accusatory instrument has been filed. *People* v. *Samuels*, 49 N. Y. 2d 218, 400 N. E. 2d 1344 (1980). These two rules operate to prohibit police from questioning a suspect after arresting him in his home unless his lawyer is present. If the police comply with *Payton*, the suspect's lawyer will likely tell him not to say any-

In short, the officers decided, apparently consistent with a "departmental policy," to violate Harris' Fourth Amendment rights so they could get evidence that they could not otherwise obtain. As the trial court held, "No more clear violation of *[Payton]*, in my view, could be established." App. 20. Where, as here, there is a particularly flagrant constitutional violation and little in the way of elapsed time or intervening circumstances, the statement in the police station must be suppressed.

II

Had the Court analyzed this case as our precedents dictate that it should, I could end my discussion here—the dispute would reduce to an application of the *Brown* factors to the constitutional wrong and the inculpatory statement that followed. But the majority chooses no such unremarkable battleground. Instead, the Court redrafts our cases in the service of conclusions they straightforwardly and explicitly reject. Specifically, the Court finds suppression unwarranted on the authority of its newly fashioned *per se* rule. In the majority's view, when police officers make a warrantless home arrest in violation of *Payton*, their physical exit from the suspect's home *necessarily* breaks the causal chain between the illegality and any subsequent statement by the suspect, such that the statement is admissible regardless of the *Brown* factors.[3]

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thing, and the police will get nothing. On the other hand, if they violate *Payton* by refusing to obtain a warrant, the suspect's right to counsel will not have attached at the time of the arrest, and the police may be able to question him without interference by a lawyer. The lower court's inference that a departmental policy of violating the Fourth Amendment existed was thus fully justified.

[3]The Court has a caveat of sorts. It holds that "*where the police have probable cause to arrest a suspect*, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Ante*, at 21 (emphasis added). But the caveat adds nothing. As the Court concedes, it is unconstitutional for the police to hold a suspect

The Court purports to defend its new rule on the basis of the self-evident proposition that the Fourth Amendment does not necessarily require the police to release or to forgo the prosecution of a suspect arrested in violation of *Payton*. *Ante*, at 18. To the Court, it follows as a matter of course from this proposition that a *Payton* violation cannot in any way be the "cause" of a statement obtained from the suspect after he has been forced from his home and is being lawfully detained. Because an attenuation inquiry presupposes *some* connection between the illegality and the statement, the Court concludes that no such inquiry is necessary here. *Ante*, at 18. Neither logic nor precedent supports that conclusion.

A

Certainly, the police were not required to release Harris or forgo his prosecution simply because officers arrested him in violation of *Payton*. But it is a dramatic leap from that unexceptionable proposition to the suggestion that the *Payton* violation thus had no effect once the police took Harris from his home. The Court's view to the contrary appears to rest on a cramped understanding of the purposes underlying *Payton*. The home is a private place, more private than any other. An invasion into the home is therefore the worst kind of invasion of privacy. An intrusion into that sanctum is an assault on the individual's solitude and on the family's communal bonds. As we said in *Payton:*

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by

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without probable cause, and any statement made during a detention for which probable cause is lacking "is unquestionably the product of [the] illegal governmental activity—*i. e.*, the wrongful detention." *Ante*, at 19. (internal quotation marks omitted; citation omitted). Thus, the Court concedes that any statement taken from a suspect who is in custody without probable cause must be suppressed, *irrespective of whether there was an antecedent* Payton *violation.*

> the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" 445 U. S., at 589–590 (ellipses in original) (quoting *Silverman* v. *United States*, 365 U. S. 505, 511 (1961)).

See also *California* v. *Ciraolo*, 476 U. S. 207, 212–213 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened").

The majority's *per se* rule in this case fails to take account of our repeated holdings that violations of privacy in the home are especially invasive. Rather, its rule is necessarily premised on the proposition that the effect of a *Payton* violation magically vanishes once the suspect is dragged from his home. But the concerns that make a warrantless home arrest a violation of the Fourth Amendment are nothing so evanescent. A person who is forcibly separated from his family and home in the dark of night after uniformed officers have broken down his door, handcuffed him, and forced him at gunpoint to accompany them to a police station does not suddenly breathe a sigh of relief at the moment he is dragged across his doorstep. Rather, the suspect is likely to be so frightened and rattled that he will say something incriminating. These effects, of course, extend far beyond the moment the physical occupation of the home ends. The entire focus of the *Brown* factors is to fix the point at which those effects are sufficiently dissipated that deterrence is not meaningfully advanced by suppression. The majority's assertion, as though the proposition were axiomatic, that the effects of such an intrusion *must* end when the violation ends is both

undefended and indefensible. The Court's saying it may make it law, but it does not make it true.

B

The majority's reading of our cases similarly lacks foundation. In the majority's view, our attenuation cases are not concerned with the lingering taint of an illegal arrest; rather, they focus solely on whether a subsequently obtained statement is made during an illegal detention of the suspect. *Ante*, at 18–19 (quoting 72 N. Y. 2d, at 625, 532 N. E. 2d, at 1235 (Titone, J., concurring)). In the Court's view, if (and only if) the detention is illegal at the moment the statement is made will it be suppressed. Unlike an arrest without probable cause, a *Payton* violation alone does not make the subsequent detention of the suspect illegal. Thus, the Court argues, no statement made after a *Payton* violation has ended is suppressible by reason of the Fourth Amendment violation as long as the police have probable cause.[4]

The majority's theory lacks any support in our cases. In each case presenting issues similar to those here, we have asked the same question: whether the invasion of privacy occasioned by the illegal *arrest* taints a statement made after the violation has ended—stated another way, whether the arrest caused the statement. See, *e. g.*, *Wong Sun*, 371 U. S., at 485–488; *Brown*, 422 U. S., at 591–592, 599, 603; *Dun-*

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[4] The Court assures us that it does not hold "that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody." *Ante*, at 20. Rather, such statements "would of course be inadmissible if, for example, they were the product of coercion, if *Miranda* warnings were not given, or if there was a violation of the rule of *Edwards* v. *Arizona*, 451 U. S. 477 (1981)." *Ibid.* As the majority is no doubt well aware, each of these examples constitutes a violation of the *Fifth* Amendment. But suppressing the consequences of a violation of the Fifth Amendment does nothing to deter violations of the Fourth. See, *supra*, at 23. The Court's disclaimer thus only serves to reinforce the conclusion that its ruling rests on the still-undefended premise that the effects of *Payton* violations end at the suspect's doorstep.

away, 442 U. S., at 217, 218; *Taylor*, 457 U. S., at 690, 694. Never before today has this Court asked whether the illegality itself was continuing at the time the evidence was secured. See *Leon*, 468 U. S., at 911 (WHITE, J., for the Court) ("In short, the 'dissipation of the taint' concept that the Court has applied in deciding whether exclusion is appropriate in a particular case 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost'") (citation omitted).

Indeed, such an approach would render irrelevant the first and second of the *Brown* factors, which focus, respectively, on the passage of time and the existence of intervening factors between the illegality and the subsequently obtained statement. If, as the majority claims, the *Brown* analysis does not even *apply* unless the illegality is ongoing at the time the evidence is secured, no time would ever pass and no circumstance would ever intervene between the illegality and the statement.

The only Supreme Court case in which the majority even attempts to find support is *United States* v. *Crews*, 445 U. S. 463 (1980). *Crews*, however, is inapposite. In that case, the defendant moved to suppress a witness's in-court identification of him on the ground that he had been illegally arrested. Crews' theory was that he was the fruit of his own illegal arrest—that he himself should have been "suppressed." Because no identification of him could have been made if he were not in the courtroom, his argument proceeded, that identification had to be suppressed in turn. The Court rejected Crews' argument:

> "Insofar as [Crews] challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. The exclusionary

> principle of *Wong Sun* and *Silverthorne Lumber Co.* [v. *United States*, 251 U. S. 385 (1920),] delimits what *proof* the Government may offer against the accused at trial, closing the courtroom door to *evidence* secured by official lawlessness. [Crews] is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." 445 U. S., at 474 (citations omitted; footnote omitted; emphases added).

Seen in context, the majority's misuse of *Crews* is apparent. As in *Wong Sun*, *Brown*, and *Taylor*, Harris seeks to suppress *evidence*—a statement he made one hour after his arrest. He does not contend that he cannot be tried because he was arrested illegally, nor does he in any way link his demand for suppression of his statement to a claim that his presence at trial, or anywhere else, should somehow be suppressed. *Crews* is therefore irrelevant. The only authority the majority cites that directly supports its novel view of *Brown* is a concurring opinion in the New York Court of Appeals, *ante*, at 19, which is hardly a sufficient basis on which to reject almost 30 years of cases.

C

Perhaps the most alarming aspect of the Court's ruling is its practical consequences for the deterrence of *Payton* violations. Imagine a police officer who has probable cause to arrest a suspect but lacks a warrant. The officer knows if he were to break into the home to make the arrest without first securing a warrant, he would violate the Fourth Amendment and any evidence he finds in the house would be suppressed. Of course, if he does not enter the house, he will not be able to use any evidence inside the house either, for the simple reason that he will never see it. The officer also knows, though, that waiting for the suspect to leave his house before arresting him could entail a lot of waiting, and the time he

would spend getting a warrant would be better spent arresting criminals. The officer could leave the scene to obtain a warrant, thus avoiding some of the delay, but that would entail giving the suspect an opportunity to flee.

More important, the officer knows that if he breaks into the house without a warrant and drags the suspect outside, the suspect, shaken by the enormous invasion of privacy he has just undergone, may say something incriminating. Before today's decision, the government would only be able to use that evidence if the Court found that the taint of the arrest had been attenuated; after the decision, the evidence will be admissible regardless of whether it was the product of the unconstitutional arrest.[5] Thus, the officer envisions the following best-case scenario if he chooses to violate the Constitution: He avoids a major expenditure of time and effort, ensures that the suspect will not escape, and procures the most damaging evidence of all, a confession. His worst-case scenario is that he will avoid a major expenditure of effort, ensure that the suspect will not escape, and will see evidence in the house (which would have remained unknown absent the constitutional violation) that cannot be used in the prosecution's case in chief. The Court thus creates powerful incentives for police officers to violate the Fourth Amendment. In the context of our constitutional rights and the sanctity of our homes, we cannot afford to presume that officers will be entirely impervious to those incentives.

I dissent.

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[5] Indeed, if the officer, as here, works in New York State, the Court's assertion that "[i]t is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*," *ante*, at 21, takes on a singularly ironic cast. The court below found as a matter of fact that the officers in this case had intentionally violated *Payton* for *precisely* the reason the Court identifies as "doubtful." See n. 2, *supra*, and accompanying text.

MISSOURI ET AL. *v.* JENKINS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–1150. Argued October 30, 1989—Decided April 18, 1990

In an action under 42 U. S. C. § 1983, the District Court found that the Kansas City, Missouri, School District (KCMSD) and petitioner State had operated a segregated school system within the KCMSD. The court issued an order detailing a desegregation remedy and the financing necessary to implement it. Although it allocated the costs of the remedy between the governmental entities, the court determined that several state-law provisions would prevent KCMSD from being able to pay its share. Rather than exercising what it believed to be its power to order a tax increase to fund the remedy, the court chose to impose other means—including enjoining the effect of one of the state-law provisions—to allow KCMSD to raise additional revenue. The Court of Appeals affirmed most of the initial order, but ordered the lower court to divide the remedy's cost equally between the entities. On remand, however, the District Court held that the State and KCMSD were 75% and 25% at fault, respectively, ordered them to share the cost of the remedy in that proportion, and held them jointly and severally liable. Subsequently, the court determined that KCMSD had exhausted all available means of raising additional revenue, and, finding itself with no choice but to exercise its remedial powers, ordered the KCMSD property tax levy increased through the 1991–1992 fiscal year. On appeal, the Court of Appeals rejected the State's argument that a federal court lacks judicial power to order a tax increase. Accepting the District Court's conclusion that state-law limitations prevented KCMSD from raising sufficient funds, it held that those limitations must fall to the Constitution's command and affirmed all of the District Court's actions taken to that point. However, concluding that federal/state comity principles required the District Court to use minimally obtrusive methods to remedy constitutional violations, it required that in the future the lower court should not set the property tax rate itself but should authorize KCMSD to submit a levy to state tax collection authorities and should enjoin the operation of state tax laws hindering KCMSD from adequately funding the remedy. The Court of Appeals' judgment was entered on August 19, 1988. On September 16, the State filed with the court a document styled "State Appellants' Petition for Rehearing En Banc." On October 14, 1988, the Court of Appeals denied this and two

similarly styled petitions by other parties seeking to intervene and issued its mandate. One of the would-be intervenors filed with this Court an application for extension of time to file a petition for certiorari 78 days after the issuance of the order denying rehearing and 134 days after the entry of the Court of Appeals' judgment. The application was returned as untimely pursuant to 28 U. S. C. § 2101(c)—which requires that a civil certiorari petition be filed within 90 days after the entry of the judgment below and that any application for an extension of time be filed within the original 90-day period—since, while the filing of a "petition for rehearing" under Federal Rule of Appellate Procedure 40 tolls the running of the 90-day period, the filing of a "suggestion for rehearing in banc" under Rule 35 does not. On January 10, 1989, the Clerk of the Court of Appeals issued an amended order, recalling the October 14 mandate and entering *nunc pro tunc* effective October 14 an order denying the three "petitions for rehearing with suggestions for rehearing en banc." The State filed a petition for certiorari within 90 days of the October 14, 1988, order, which was granted, limited to the question of the property tax increase.

Held:

1. The State's certiorari petition was timely filed. The Court of Appeals appears to have interpreted and actually treated the State's papers as including a petition for rehearing before the panel. Had it regarded the State's papers as only a suggestion for rehearing in banc, without a petition for rehearing, it would have, as required by Federal Rules of Appellate Procedure 35(c) and 41(a), issued its mandate within 21 days of the entry of the panel's judgment or would have, under Rule 41(a), issued an order extending the time for the issuance of the mandate. Although this Court of Appeals may not on every occasion have observed these technicalities, it cannot be concluded that the court has engaged in a systematic practice of ignoring them. Although a court cannot, *post hoc*, amend an order to make it appear that it took an action which it never took, the Court of Appeals actually amended its order to reflect the reality of the action taken on October 14, at which time it had entered an order denying the "petitions for rehearing en banc" because this was the manner in which the papers filed with the court had been styled. While the court below, unlike other Courts of Appeals, does not have a published practice of treating all suggestions for rehearing in banc as containing both petitions for rehearing and suggestions for rehearing in banc, this Court will not assume that the court's action in this case is not in accord with its regular practice. Pp. 45–50.

2. The District Court abused its discretion in imposing the tax increase, which contravened the principles of comity. Although that court believed that it had no alternative to imposing the tax itself, it, in

fact, had the very alternative outlined by the Court of Appeals. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems. While a district court should not grant local government *carte blanche*, local officials should at least have the opportunity to devise their own solutions to such problems. Here, KCMSD was ready, willing, and, but for the operation of state law, able to remedy the deprivation of constitutional rights itself. Pp. 50–52.

3. The Court of Appeals' modifications of the District Court's order satisfy equitable and constitutional principles governing the District Court's power. Pp. 52–58.

(a) This Court accepts the Court of Appeals' conclusion that the District Court's remedy was proper. The State's argument that the funding ordered by the District Court violates the principles of equity and comity because the remedial order itself was excessive aims at the scope of the remedy rather than the manner in which the remedy is to be funded and thus falls outside this Court's limited grant of certiorari. P. 53.

(b) Under the circumstances of this case, the District Court did not abuse its discretion in ruling that KCMSD should be responsible for funding its share of the remedy. *Milliken* v. *Bradley*, 433 U. S. 267, did not hold that a district court could never set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations just because those funds could also be obtained from the States. To the contrary, § 1983 is authority enough to require each tortfeasor to pay its share of the cost of a remedy if it can, and apportionment of the cost is part of the District Court's equitable powers. Here, the court believed that the Court of Appeals had ordered it to allocate the costs between the two entities. Had the court chosen, as the State argues, to allow the monetary obligations that KCMSD could not meet to fall on the State rather than interfere with state law to permit KCMSD to meet them, the implementation of the order might have been delayed if the State resisted efforts by KCMSD to obtain contribution. Pp. 53–54.

(c) The modifications are not invalid under the Tenth Amendment, since that Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. P. 55.

(d) The Court of Appeals' order does not exceed the judicial power under Article III. A court can direct a local government body to levy

its own taxes. See, *e. g.*, *Griffin* v. *Prince Edward County School Bd.*, 377 U. S. 218, 233. The State's argument that federal courts cannot set aside state-imposed limitations on local taxing authority because that requires local governments to do more than exercise the power that is theirs has been rejected, *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, and fails to take account of local governments' obligations, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. Pp. 55–58.

855 F. 2d 1295, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III and IV, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post*, p. 58.

H. Bartow Farr III argued the cause for petitioners. With him on the briefs were *William Webster*, Attorney General of Missouri, *James B. Deutsch*, Deputy Attorney General, *Michael J. Fields*, Assistant Attorney General, and *David R. Boyd*.

Allen R. Snyder argued the cause for respondents. With him on the brief for respondents Kalima Jenkins et al. were *David S. Tatel*, *Walter A. Smith, Jr.*, *Patricia A. Brannan*, *Shirley W. Keeler*, *Arthur A. Benson II*, *James S. Liebman*, *Julius L. Chambers*, *James M. Nabrit III*, *Theodore M. Shaw*, and *Norman J. Chachkin*. *Michael D. Gordon* and *Lawrence A. Poltrock* filed a brief for respondent American Federation of Teachers, Local 691.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New Mexico by *Hal Stratton*, Attorney General, *Randall W. Childress*, Deputy Attorney General, *Charles R. Peifer*, Chief Assistant Attorney General, and *Paul Farley*, Assistant Attorney General; for Jackson County, Missouri, by *John B. Williams* and *Russell D. Jacobson;* for the National Governors' Association et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *Andrew D. Hurwitz;* and for Icelean Clark et al. by *Mark J. Bredemeier* and *Jerald L. Hill*.

Peter S. Hendrixson filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

JUSTICE WHITE delivered the opinion of the Court.

The United States District Court for the Western District of Missouri imposed an increase in the property taxes levied by the Kansas City, Missouri, School District (KCMSD) to ensure funding for the desegregation of KCMSD's public schools. We granted certiorari to consider the State of Missouri's argument that the District Court lacked the power to raise local property taxes. For the reasons given below, we hold that the District Court abused its discretion in imposing the tax increase. We also hold, however, that the modifications of the District Court's order made by the Court of Appeals do satisfy equitable and constitutional principles governing the District Court's power.

I

In 1977, KCMSD and a group of KCMSD students filed a complaint alleging that the State of Missouri and surrounding school districts had operated a segregated public school system in the Kansas City metropolitan area.[1] The District Court realigned KCMSD as a party defendant, *School Dist. of Kansas City* v. *Missouri*, 460 F. Supp. 421 (WD Mo. 1978), and KCMSD filed a cross-claim against the State, seeking indemnification for any liability that might be imposed on KCMSD for intradistrict segregation.[2] After a lengthy trial, the District Court found that KCMSD and the State had operated a segregated school system within the KCMSD. *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (1984).[3]

[1] This litigation has come to us once before, on the collateral issue of attorney's fees. *Missouri* v. *Jenkins*, 491 U. S. 274 (1989).

[2] The complaint originally alleged that the defendants had caused interdistrict segregation of the public schools. After KCMSD was realigned as a defendant, a group of students filed an amended complaint that also alleged intradistrict segregation. The District Court certified a plaintiff class of present and future KCMSD students.

[3] The District Court also found that none of the alleged discriminatory actions had resulted in lingering interdistrict effects and so dismissed the suburban school districts and denied interdistrict relief.

The District Court thereafter issued an order detailing the remedies necessary to eliminate the vestiges of segregation and the financing necessary to implement those remedies. *Jenkins* v. *Missouri*, 639 F. Supp. 19 (1985).[4] The District Court originally estimated the total cost of the desegregation remedy to be almost $88 million over three years, of which it expected the State to pay $67,592,072 and KCMSD to pay $20,140,472. *Id.*, at 43–44. The court concluded, however, that several provisions of Missouri law would prevent KCMSD from being able to pay its share of the obligation. *Id.*, at 44. The Missouri Constitution limits local property taxes to $1.25 per $100 of assessed valuation unless a majority of the voters in the district approve a higher levy, up to $3.25 per $100; the levy may be raised above $3.25 per $100 only if two-thirds of the voters agree. Mo. Const., Art. X, §§ 11(b),(c).[5] The "Hancock Amendment" requires property tax rates to be rolled back when property is assessed at a higher valuation to ensure that taxes will not be increased solely as a result of reassessments. Mo. Const., Art. X,

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[4] KCMSD was ordered to improve the quality of the curriculum and library, reduce teaching load, and implement tutoring, summer school, and child development programs. The cost of these remedies was to be borne equally by the State and KCMSD. 639 F. Supp., at 28, 31–33. The District Court ordered an extensive capital improvement program to rehabilitate the deteriorating physical plant of KCMSD, the cost of which was estimated as at least $37 million, of which $27 million was to be contributed by the State. *Id.*, at 39–41. The District Court also required the defendants to encourage voluntary interdistrict transfer of students. No cost was placed on the interdistrict transfer program, but the State was ordered to underwrite the program in full. *Id.*, at 38–39. The District Court further ordered the State to fund fully other portions of the desegregation program intended to reduce class size and to improve student achievement. *Id.*, at 30, 33.

[5] KCMSD voters approved a levy of $3.75 per $100 in 1969, but efforts to raise the tax rate higher than that had consistently failed to obtain the approval of two-thirds of the voters, and the District Court found it unlikely that a proposal to raise taxes above $3.75 per $100 would receive the voters' approval. *Id.*, at 44.

§ 22(a); Mo. Rev. Stat. § 137.073.2 (1986). The Hancock Amendment thus prevents KCMSD from obtaining any revenue increase as a result of increases in the assessed valuation of real property. "Proposition C" allocates one cent of every dollar raised by the state sales tax to a schools trust fund and requires school districts to reduce property taxes by an amount equal to 50% of the previous year's sales tax receipts in the district. Mo. Rev. Stat. § 164.013.1 (Supp. 1988). However, the trust fund is allocated according to a formula that does not compensate KCMSD for the amount lost in property tax revenues, and the effect of Proposition C is to divert nearly half of the sales taxes collected in KCMSD to other parts of the State.

The District Court believed that it had the power to order a tax increase to ensure adequate funding of the desegregation plan, but it hesitated to take this step. It chose instead to enjoin the effect of the Proposition C rollback to allow KCMSD to raise an additional $4 million for the coming fiscal year. The court ordered KCMSD to submit to the voters a proposal for an increase in taxes sufficient to pay for its share of the desegregation remedy in following years. *Jenkins* v. *Missouri*, 639 F. Supp., at 45.

The Court of Appeals for the Eighth Circuit affirmed the District Court's findings of liability and remedial order in most respects. *Jenkins* v. *Missouri*, 807 F. 2d 657 (1986) (in banc). The Court of Appeals agreed with the State, however, that the District Court had failed to explain adequately why it had imposed most of the cost of the desegregation plan on the State. *Id.*, at 684, 685. The Eighth Circuit ordered the District Court to divide the cost equally between the State and KCMSD. *Id.*, at 685. We denied certiorari. *Kansas City, Missouri, School Dist.* v. *Missouri*, 484 U. S. 816 (1987).

Proceedings before the District Court continued during the appeal. In its original remedial order, the District Court had directed KCMSD to prepare a study addressing the use-

fulness of "magnet schools" to promote desegregation.[6] *Jenkins* v. *Missouri*, *supra*, at 34–35. A year later, the District Court approved KCMSD's proposal to operate six magnet schools during the 1986–1987 school year.[7] The court again faced the problem of funding, for KCMSD's efforts to persuade the voters to approve a tax increase had failed, as had its efforts to seek funds from the Kansas City Council and the state legislature. Again hesitating to impose a tax increase itself, the court continued its injunction against the Proposition C rollback to enable KCMSD to raise an additional $6.5 million. App. 138–142.

In November 1986, the District Court endorsed a marked expansion of the magnet school program. It adopted in substance a KCMSD proposal that every high school, every middle school, and half of the elementary schools in KCMSD become magnet schools by the 1991–1992 school year. It also approved the $142,736,025 budget proposed by KCMSD for implementation of the magnet school plan, as well as the expenditure of $52,858,301 for additional capital improvements. App. to Pet. for Cert. 120a–124a.

The District Court next considered, as the Court of Appeals had directed, how to shift the cost of desegregation to KCMSD. The District Court concluded that it would be "clearly inequitable" to require the population of KCMSD to pay half of the desegregation cost, and that "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." *Id.*, at 112a. The court reasoned that the State should pay for most of the desegregation cost under the principle that "'the per-

[6] "Magnet schools," as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality. See Price & Stern, Magnet Schools as a Strategy for Integration and School Reform, 5 Yale L. & Policy Rev. 291 (1987).

[7] The District Court authorized $12,972,727 for operation of the six magnet schools and $12,877,330 for further capital improvements at those schools. *Jenkins* v. *Missouri*, 639 F. Supp., at 53–55.

son who starts the fire has more responsibility for the damages caused than the person who fails to put it out,'" *id.* at 111a, and that apportionment of damages between the State and KCMSD according to fault was supported by the doctrine of comparative fault in tort, which had been adopted by the Missouri Supreme Court in *Gustafson* v. *Benda*, 661 S. W. 2d 11 (1983). The District Court then held that the State and KCMSD were 75% and 25% at fault, respectively, and ordered them to share the cost of the desegregation remedy in that proportion. To ensure complete funding of the remedy, the court also held the two tortfeasors jointly and severally liable for the cost of the plan. App. to Pet. for Cert. 113a.

Three months later, the District Court adopted a plan requiring $187,450,334 in further capital improvements. 672 F. Supp. 400, 408 (WD Mo. 1987). By then it was clear that KCMSD would lack the resources to pay for its 25% share of the desegregation cost. KCMSD requested that the District Court order the State to pay for any amount that KCMSD could not meet. The District Court declined to impose a greater share of the cost on the State, but it accepted that KCMSD had "exhausted all available means of raising additional revenue." *Id.*, at 411. Finding itself with "no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan," *ibid.*, and believing that the "United States Supreme Court has stated that a tax may be increased if 'necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system,'" *id.*, at 412 (quoting *Griffin* v. *Prince Edward County School Bd.*, 377 U. S. 218, 233 (1964)), the court ordered the KCMSD property tax levy raised from $2.05 to $4.00 per $100 of assessed valuation through the 1991–1992 fiscal year. 672 F. Supp., at 412–413.[8] KCMSD was also directed to issue $150

[8] The District Court also imposed a 1.5% surcharge on the state income tax levied within the KCMSD. 672 F. Supp. 400, 412 (WD Mo. 1987). The income tax surcharge was reversed by the Eighth Circuit. 855 F. 2d

million in capital improvement bonds. *Id.*, at 413. A subsequent order directed that the revenues generated by the property tax increase be used to retire the capital improvement bonds. App. to Pet. for Cert. 63a.

The State appealed, challenging the scope of the desegregation remedy, the allocation of the cost between the State and KCMSD, and the tax increase. A group of local taxpayers (Clark Group) and Jackson County, Missouri, also appealed from an order of the District Court denying their applications to intervene as of right. A panel of the Eighth Circuit affirmed in part and reversed in part. 855 F. 2d 1295 (1988). With respect to the would-be intervenors, the Court of Appeals upheld the denial of intervention. *Id.*, at 1316–1317. The scope of the desegregation order was also upheld against all the State's objections, *id.*, at 1301–1307, as was the allocation of costs, *id.*, at 1307–1308.

Turning to the property tax increase, the Court of Appeals rejected the State's argument that a federal court lacks the judicial power to order a tax increase. The Court of Appeals agreed with the District Court that *Griffin* v. *Prince Edward County School Bd.*, *supra*, at 233, had established the District Court's authority to order county officials to levy taxes.[9] Accepting also the District Court's conclusion that state law prevented KCMSD from raising funds sufficient to implement the desegregation remedy, the Court of Appeals held that such state-law limitations must fall to the command of the Constitution. 855 F. 2d, at 1313.

1295, 1315–1316 (1988). Respondents did not cross-petition to challenge this aspect of the Court of Appeals' judgment, so the surcharge is not before us.

[9] The Court of Appeals also relied on Circuit precedent suggesting that a district court could order a property tax increase after exploring every other fiscal alternative. *Id.*, at 1310–1311; see *Liddell* v. *Missouri*, 731 F. 2d 1294 (in banc), cert. denied, 469 U. S. 816 (1984); *United States* v. *Missouri*, 515 F. 2d 1365 (in banc), cert. denied *sub nom. Ferguson Reorganized School Dist. R–2* v. *United States*, 423 U. S. 951 (1975).

Although the Court of Appeals thus "affirm[ed] the actions that the [District] [C]ourt has taken to this point," *id.*, at 1314, it agreed with the State that principles of federal/state comity required the District Court to use "minimally obtrusive methods to remedy constitutional violations." *Ibid.* The Court of Appeals thus required that in the future, the District Court should not set the property tax rate itself but should authorize KCMSD to submit a levy to the state tax collection authorities and should enjoin the operation of state laws hindering KCMSD from adequately funding the remedy.[10] The Court of Appeals reasoned that permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials. *Ibid.*[11]

The judgment of the Court of Appeals was entered on August 19, 1988. On September 16, 1988, the State filed with the Court of Appeals a document styled "State Appellants' Petition for Rehearing En Banc." App. 489–502. Jackson County also filed a "Petition . . . for Rehearing by Court En Banc," *id.*, at 458–469, and Clark Group filed a "Petition for Rehearing En Banc with Suggestions in Support." *Id.*, at 470–488. On October 14, 1988, the Court of Appeals denied the petitions with an order stating as follows: "There are now three petitions for rehearing en banc pending before the Court. It is hereby ordered that all petitions for rehearing

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[10] The Court of Appeals rejected the argument that such an injunction would violate the Tax Injunction Act, 28 U. S. C. § 1341, as the injunction would require the collection of additional taxes, not inhibit the collection of taxes. 855 F. 2d, at 1315. Accord, *Appling County* v. *Municipal Electric Authority of Georgia*, 621 F. 2d 1301, 1304 (CA5), cert. denied, 449 U. S. 1015 (1980).

[11] Chief Judge Lay dissented from the resolution of the property tax issue. He argued that as the State and KCMSD were jointly and severally liable for the cost of the desegregation remedy, the District Court should have allowed any amount that KCMSD was unable to pay to fall on the State rather than require the tax increase. 855 F. 2d, at 1318.

en banc are denied." App. to Pet. for Cert. 53a. The mandate of the Court of Appeals issued on October 14.

On December 31, 1988, 78 days after the issuance of the order denying rehearing and 134 days after the entry of the Court of Appeals' judgment, Jackson County presented to this Court an application for extension of time in which to file a petition for certiorari.[12] The Clerk of this Court returned the application to Jackson County as untimely. App. 503. According to the Clerk, the 90-day period in which Jackson County could petition for certiorari began to run on August 19, 1988, and expired on November 17, 1988. The Clerk informed Jackson County that although the timely filing of a "petition for rehearing" with the Court of Appeals tolls the running of the 90-day period, the filing of a "petition for rehearing en banc" does not toll the time.

On January 10, 1989, the Clerk of the Eighth Circuit issued an order amending the order of October 14, 1988. The amended order stated:

> "This Court's mandate which was issued on October 14, 1988, is hereby recalled.
>
> "There are three (3) *petitions for rehearing with suggestions for rehearing en banc* pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.
>
> "This order is entered nunc pro tunc effective October 14, 1988. The Court's mandate shall now issue forthwith." *Id.*, at 513 (emphasis added).

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[12] As we discuss *infra*, at 45, 28 U. S. C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days after the entry of the judgment sought to be reviewed. Section 2101(c) also permits a Justice of this Court, "for good cause shown," to grant an extension of time for the filing of a petition for certiorari in a civil case for a period not exceeding 60 days. In civil cases, applications for extension of time must be presented during the original 90-day period. This Court's Rule 30.2.

The State, Jackson County, and Clark Group filed petitions for certiorari within 90 days of the October 14, 1988, order. The State's petition argued that the remedies imposed by the District Court were excessive in scope and that the property tax increase violated Article III, the Tenth Amendment, and principles of federal/state comity. We denied the petitions of Jackson County and Clark Group. 490 U. S. 1034 (1989). We granted the State's petition, limited to the question of the property tax increase, but we requested the parties to address whether the petition was timely filed. 490 U. S. 1034 (1989).

II

We deal first with the question of our own jurisdiction. Title 28 U. S. C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.

Since *Department of Banking of Nebraska* v. *Pink*, 317 U. S. 264 (1942), it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing.[13] As

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[13] This practice is now reflected in this Court's Rule 13.4: "[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc . . . is not a petition for rehearing within the meaning of this Rule." The practice does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court. In such cases, of which *Pink* was one, "no . . . alteration of the rights [is] asked, and the finality of the court's first order [is] never sus-

was explained in *Pink*, "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Id.*, at 266. To put the matter another way, while the petition for rehearing is pending, there is no "judgment" to be reviewed. Cf. *Zimmern* v. *United States*, 298 U. S. 167, 169 (1936); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 205 (1943).

But as respondents point out, it has also been our consistent practice to treat suggestions for rehearing in banc presented to the United States Courts of Appeals that do not also include petitions for rehearing by the panel as not tolling the period for seeking certiorari. Our Rule 13.4 now expressly incorporates this practice. See n. 13, *supra*. This practice rests on the important distinction between "petitions for rehearing," which are authorized by Rule 40(a) of the Federal Rules of Appellate Procedure, and "suggestions for rehearing in banc," which are permitted by Rule 35(b).[14] In

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pended." 317 U. S., at 266. See also *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206 (1952).

[14] A petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked. Fed. Rule App. Proc. 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them. Rehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions. Fed. Rule App. Proc. 35(a). As the Reporter for the Advisory Committee drafting the Rules has observed: "[A] party who desires a hearing or rehearing in banc may 'suggest' the appropriateness of such a hearing. . . . The term 'suggest' was deliberately chosen to make it clear that a party's sole entitlement is to direct the attention of the court to the desirability of in banc consideration. A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the court." Ward, The Federal Rules of Appellate Procedure, 28 Federal B. J. 100, 110–111 (1968); see also *Moody* v. *Albemarle Paper Co.*, 417 U. S. 622, 625 (1974) *(per curiam)*; *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); *Western Pacific Railroad Case*, 345 U. S. 247, 258–259 (1953). Consequently, Rule 35(c) specifically provides that

this case, the State styled its filing as a "Petition for Rehearing En Banc."[15] There is technically no provision for the filing of a "Petition for Rehearing En Banc" in the Rules of Appellate Procedure. A party may petition for rehearing before the panel under Rule 40, file a suggestion for a rehearing in banc under Rule 35, or do both, separately or together. The State's filing on its face did not exactly comport with any of these options. If the filing was no more than a suggestion for rehearing in banc, as respondents insist, the petition for certiorari was untimely. But if, as the State argues, its papers qualified for treatment as a petition for rehearing within the meaning of Rule 40 as well as a suggestion for rehearing in banc under Rule 35, the 90-day period for seeking certiorari began on October 14, 1988, and the State's petition for certiorari was timely filed.

Though the matter is not without difficulty, we conclude that the State has the better of the argument. It appears to us that the Court of Appeals interpreted and actually treated the State's papers as including a petition for rehearing before the panel.[16] If the Eighth Circuit had regarded the State's

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the filing of a suggestion for rehearing in banc, unlike a petition for rehearing, "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate."

[15] We note that the Federal Rules of Appellate Procedure and 28 U. S. C. § 46(c) (which provides the courts of appeals with authority to sit in banc) speak of rehearing *in* banc, not *en* banc.

[16] Although respondents do not agree that the Eighth Circuit so treated the State's papers, they do not argue the Court of Appeals lacked the power to treat the State's "Petition for Rehearing En Banc" as a petition for panel rehearing, even if it was intended subjectively and could be read objectively as only a suggestion for rehearing in banc. Furthermore, parties frequently combine a petition for rehearing and a suggestion for rehearing in banc in one document incorrectly labeled as a "petition for rehearing in banc," see Advisory Committee's Notes on Fed. Rule App. Proc. 35, 28 U. S. C. App., p. 491, and the Eighth Circuit may have believed, because of the label on the State's papers, that the State intended its filing to be read as containing both. Other Circuits routinely treat documents so la-

papers as only a suggestion for rehearing in banc, without a petition for panel rehearing as well, Rules 35(c) and 41(a) of the Federal Rules of Appellate Procedure would have required the court to issue its mandate within 21 days of the entry of the panel's judgment.[17] The Court of Appeals did not issue the mandate within 21 days of the panel's judgment, but issued it only upon its October 14 order denying the State's petition. Nor did the Court of Appeals issue an order extending the time for the issuance of the mandate, as it may do under Rule 41(a).

Respondents insist that the Eighth Circuit routinely withholds the mandate during the pendency of a suggestion for rehearing in banc even without the order contemplated by Rule 41(a) and point us to *United States* v. *Samuels*, 808 F. 2d 1298, 1299 (1987), where the Chief Judge of that court wrote separately respecting the denial of rehearing in banc to emphasize that the Eighth Circuit has done so. The Court of Appeals may not on every occasion have observed the technicalities of Rules 35(c) and 41(a), but we cannot conclude from the respondents' submission that the Eighth Circuit has engaged in a systematic practice of ignoring those formalities. We presume that the Eighth Circuit withheld the mandate

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beled as containing only suggestions for rehearing in banc. See, *e. g.*, *United States* v. *Buljubasic*, 828 F. 2d 426 (CA7 1987).

[17] Rule 35(c) explicitly states that the pendency of a suggestion for rehearing in banc shall not "affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." Rule 41(a) requires the mandate of the Court of Appeals to issue "21 days after the entry of judgment unless the time is shortened or enlarged by order," but provides that a timely petition for panel rehearing "will stay the mandate until disposition of the petition unless otherwise ordered by the court." This case thus stands in contrast to *United States* v. *Buljubasic*, *supra*, where the Court of Appeals allowed the mandate to issue even though the appellant had filed a "Petition for Rehearing En Banc." In that case, the Court of Appeals treated the "Petition" as only a suggestion for rehearing in banc and allowed the mandate to issue, as it was required to do under Rule 35(c).

because, under Rule 41(a), it must do so when a petition for panel rehearing is pending.

It is true that the Eighth Circuit's original October 14 order stated that there were three "petitions for rehearing en banc pending before the Court" and that all "petitions for rehearing en banc" were denied. Only after this Court's Clerk informed Jackson County that its application for extension of time was untimely did the Court of Appeals amend its October 14 order *nunc pro tunc* to state that there were "petitions for rehearing with suggestions for rehearing en banc pending before the Court" and that those "petitions for rehearing . . . with suggestions for rehearing en banc" were denied. Respondents argue that the original order is more probative of the Eighth Circuit's contemporaneous treatment of the State's petition, and they contend that order clearly does not treat the petition as requesting panel rehearing. They insist that the Eighth Circuit cannot, *post hoc*, amend its order to make it appear that it took an action which it never took.

The Court of Appeals of course cannot make the record what it is not. The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time. Cf. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137 (1937); *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141, 145 (1906); *Credit Co.* v. *Arkansas Central R. Co.*, 128 U. S. 258, 261 (1888). But, as we see it, that is not what happened in this case: the Eighth Circuit originally entered an order denying the "petitions for rehearing en banc" because the papers filed with the court were styled as "petitions for rehearing en banc." When it was subsequently brought to the Eighth Circuit's attention that it had neglected to refer to those papers in its order as petitions for rehearing with suggestions for rehearing in banc, the court amended its order *nunc pro tunc* to ensure that the order reflected the reality of the action taken on October 14. The Eighth Circuit surely knows

more than we do about the meaning of its orders, and we accept its action for what it purports to be.

The Eighth Circuit, unlike other Circuits, does not have a published practice of treating all suggestions for rehearing in banc, no matter how styled, as containing both petitions for panel rehearing and suggestions for rehearing in banc. Cf. *Gonzalez* v. *Southern Pacific Transportation Co.*, 773 F. 2d 637, 639 (CA5 1985); Eleventh Circuit Rule 35–6. Respondents argue that accepting the Eighth Circuit's interpretation of its October 14 order in this case risks confusion in future cases and invites the lower courts to pick and choose between those parties whose "petitions for rehearing in banc" they view favorably and wish to give additional time for seeking review in this Court, and those whose petitions they wish to give no such aid.

We share respondents' concern about the stability and clarity of jurisdictional rules. It is undoubtedly desirable to have published rules of procedure giving parties fair warning of the treatment afforded petitions for rehearing and suggestions for rehearing in banc. Regular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance. But in the end we accept the Eighth Circuit's interpretation of its October 14 order and will not assume that its action in this case is not in accord with its regular practice.

III

We turn to the tax increase imposed by the District Court. The State urges us to hold that the tax increase violated Article III, the Tenth Amendment, and principles of federal/state comity. We find it unnecessary to reach the difficult constitutional issues, for we agree with the State that the tax increase contravened the principles of comity that must govern the exercise of the District Court's equitable discretion in this area.

It is accepted by all the parties, as it was by the courts below, that the imposition of a tax increase by a federal court was an extraordinary event. In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task. We have emphasized that although the "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited," *Whitcomb* v. *Chavis*, 403 U. S. 124, 161 (1971), and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves.

The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative, the very one outlined by the Court of Appeals: it could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power. 855 F. 2d, at 1314; see *infra*, at 52. The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.

As *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955), observed, local authorities have the "primary responsibility for elucidating, assessing, and solving" the problems of desegregation. See also *Milliken* v. *Bradley*, 433 U. S.

267, 281 (1977). This is true as well of the problems of financing desegregation, for no matter has been more consistently placed upon the shoulders of local government than that of financing public schools. As was said in another context, "[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that . . . 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 42 (1973) (quoting *Jefferson* v. *Hackney*, 406 U. S. 535, 546–547 (1972)). By no means should a district court grant local government *carte blanche*, cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1 (1971), but local officials should at least have the opportunity to devise their own solutions to these problems. Cf. *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187, 196 (1972) *(per curiam)*.

The District Court therefore abused its discretion in imposing the tax itself. The Court of Appeals should not have allowed the tax increase to stand and should have reversed the District Court in this respect. See *Langnes* v. *Green*, 282 U. S. 531, 541–542 (1931).

IV

We stand on different ground when we review the modifications to the District Court's order made by the Court of Appeals. As explained *supra*, at 43, the Court of Appeals held that the District Court in the future should authorize KCMSD to submit a levy to the state tax collection authorities adequate to fund its budget and should enjoin the operation of state laws that would limit or reduce the levy below that amount. 855 F. 2d, at 1314.[18]

[18] The Court of Appeals "affirm[ed] the actions that the court has taken to this point," but detailed "the procedures which the district court should use in the future." 855 F. 2d, at 1314. The Court of Appeals' discussion of the procedures to be used in the future was not dictum, for the court had before it the State's appeal from the entire funding order of the District

The State argues that the funding ordered by the District Court violates principles of equity and comity because the remedial order itself was excessive. As the State puts it, "[t]he only reason that the court below needed to consider an unprecedented tax increase was the equally unprecedented cost of its remedial programs." Brief for Petitioners 42. We think this argument aims at the scope of the remedy rather than the manner in which the remedy is to be funded and thus falls outside our limited grant of certiorari in this case. As we denied certiorari on the first question presented by the State's petition, which did challenge the scope of the remedial order, we must resist the State's efforts to argue that point now. We accept, without approving or disapproving, the Court of Appeals' conclusion that the District Court's remedy was proper. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 215 (1947).

The State has argued here that the District Court, having found the State and KCMSD jointly and severally liable, should have allowed any monetary obligations that KCMSD

Court. The Court of Appeals required the District Court to use the less obtrusive procedures beginning with the fiscal year commencing after the remand but did not require the District Court to reverse the tax increase that it had imposed for prior fiscal years. See *id.*, at 1299 ("[W]e modify [the order's] future operation to more closely comport with limitations upon our judicial authority"); *id.*, at 1318 ("We . . . remand for further modifications as provided in this opinion"). This interpretation is supported by an order of the District Court issued on January 3, 1989. The District Court took no action to reverse its tax increase through fiscal year 1988–1989. The court also denied as premature a motion by KCMSD to approve a proposed property tax levy of $4.23 for fiscal year 1989–1990. The court then directed KCMSD to "approve a property tax levy rate for 1989 at a later date when financial calculations for the 1989–1990 school year are clear and submit the proposed levy rate to the Court for approval at that time." App. 511–512. This direction indicates that the District Court understood that it was now obliged to allow KCMSD to set the tax levy itself. The District Court's approval of the levy was necessary because the Court of Appeals had required it to establish a maximum for the levy. See 855 F. 2d, at 1314.

could not meet to fall on the State rather than interfere with state law to permit KCMSD to meet them.[19] Under the circumstances of this case, we cannot say it was an abuse of discretion for the District Court to rule that KCMSD should be responsible for funding its share of the remedy. The State strenuously opposed efforts by respondents to make it responsible for the cost of implementing the order and had secured a reversal of the District Court's earlier decision placing on it all of the cost of substantial portions of the order. See 807 F. 2d, at 684–685. The District Court declined to require the State to pay for KCMSD's obligations because it believed that the Court of Appeals had ordered it to allocate the costs between the two governmental entities. See 672 F. Supp., at 411. Furthermore, if the District Court had chosen the route now suggested by the State, implementation of the remedial order might have been delayed if the State resisted efforts by KCMSD to obtain contribution.

It is true that in *Milliken* v. *Bradley*, 433 U. S., at 291, we stated that the enforcement of a money judgment against the State did not violate principles of federalism because "[t]he District Court . . . neither attempted to restructure local governmental entities nor . . . mandat[ed] a particular method or structure of state or local financing." But we did not there state that a district court could never set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations just because those funds could also be obtained from the States. To the contrary, 42 U. S. C. § 1983, on which respondents' complaint is based, is authority enough to require each tortfeasor to pay its share of the cost of the remedy if it can, and apportionment of the cost is part of the equitable power of the District Court. Cf. *Milliken* v. *Bradley*, *supra*, at 289–290.

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[19] See Tr. of Oral Arg. 14. This suggestion was also made by the judge dissenting below and by Clark Group. See 855 F. 2d, at 1318 (Lay, C. J., concurring and dissenting); Brief for Icelean Clark et al. as *Amici Curiae* 25–26.

We turn to the constitutional issues. The modifications ordered by the Court of Appeals cannot be assailed as invalid under the Tenth Amendment. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." 433 U. S., at 291. "The Fourteenth Amendment . . . was avowedly directed against the power of the States," *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 42 (1989) (SCALIA, J., concurring in part and dissenting in part), and so permits a federal court to disestablish local government institutions that interfere with its commands. Cf. *New York City Bd. of Estimate* v. *Morris*, 489 U. S. 688 (1989); *Reynolds* v. *Sims*, 377 U. S. 533, 585 (1964).

Finally, the State argues that an order to increase taxes cannot be sustained under the judicial power of Article III. Whatever the merits of this argument when applied to the District Court's own order increasing taxes, a point we have not reached, see *supra*, at 53, a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court. We held as much in *Griffin* v. *Prince Edward County School Bd.*, 377 U. S., at 233, where we stated that a District Court, faced with a county's attempt to avoid desegregation of the public schools by refusing to operate those schools, could "require the [County] Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system . . . ." *Griffin* followed a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. See, *e. g.*, *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U. S. 170 (1909); *Graham* v. *Folsom*, 200 U. S. 248 (1906); *Wolff* v. *New Orleans*, 103 U. S. 358 (1881); *United States* v. *New Orleans*, 98 U. S. 381 (1879); *Heine* v. *Levee*

Commissioners, 19 Wall. 655, 657 (1874); *City of Galena* v. *Amy*, 5 Wall. 705 (1867); *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1867); *Board of Commissioners of Knox County* v. *Aspinwall*, 24 How. 376 (1861).[20]

The State maintains, however, that even under these cases, the federal judicial power can go no further than to require local governments to levy taxes *as authorized under state law*. In other words, the State argues that federal courts cannot set aside state-imposed limitations on local taxing authority because to do so is to do more than to require the local government "to exercise the power *that is theirs*." We disagree. This argument was rejected as early as *Von Hoffman* v. *City of Quincy*, *supra*. There the holder of bonds issued by the city sought a writ of mandamus against the city requiring it to levy taxes sufficient to pay interest

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[20] The old cases recognized two exceptions to this rule, neither of which is relevant here. First, it was held that federal courts could not by writ of mandamus compel state officers to release funds in the state treasury sufficient to satisfy state bond obligations. The Court viewed this attempt to employ the writ of mandamus as a ruse to avoid the Eleventh Amendment's bar against exercising federal jurisdiction over the State. See *Louisiana* v. *Jumel*, 107 U. S. 711, 720–721 (1883). This holding has no application to this case, for the Eleventh Amendment does not bar federal courts from imposing on the States the costs of securing prospective compliance with a desegregation order, *Milliken* v. *Bradley*, 433 U. S. 267, 290 (1977), and does not afford local school boards like KCMSD immunity from suit, *Mt. Healthy City Bd. of Education* v. *Doyle*, 429 U. S. 274, 280–281 (1977). Second, it was held that the writ of mandamus would not lie to compel the collection of taxes when there was no person against whom the writ could operate. See *Meriwether* v. *Garrett*, 102 U. S. 472, 501 (1880); *id.*, at 515 (Field, J., concurring in judgment) ("[W]hen the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act"); cf. *Wolff* v. *New Orleans*, 103 U. S. 358, 368 (1881) (distinguishing *Meriwether*, *supra*). This exception also has no application to this case, where there are state and local officials invested with authority to collect and disburse the property tax and where, as matters now stand, the District Court need only prevent those officials from applying state law that would interfere with the willing levy of property taxes by KCMSD.

coupons then due. The city defended based on a state statute that limited its power of taxation, and the Circuit Court refused to mandamus the city. This Court reversed, observing that the statute relied on by the city was passed after the bonds were issued and holding that because the city had ample authority to levy taxes to pay its bonds when they were issued, the statute impaired the contractual entitlements of the bondholders, contrary to Art. I, § 10, cl. 1, of the Constitution, under which a State may not pass any law impairing the obligation of contracts. The statutory limitation, therefore, could be disregarded and the city ordered to levy the necessary taxes to pay its bonds.

It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation. In *Von Hoffman*, the limitation was disregarded because of the Contract Clause. Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. However wide the discretion of local authorities in fashioning desegregation remedies may be, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina Bd. of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the

process by preventing a local government from implementing that remedy.[21]

Accordingly, the judgment of the Court of Appeals is affirmed insofar as it required the District Court to modify its funding order and reversed insofar as it allowed the tax increase imposed by the District Court to stand. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, concurring in part and concurring in the judgment.

In agreement with the Court that we have jurisdiction to decide this case, I join Parts I and II of the opinion. I agree also that the District Court exceeded its authority by attempting to impose a tax. The Court is unanimous in its holding, that the Court of Appeals' judgment affirming "the actions that the [district] court has taken to this point," 855 F. 2d 1295, 1314 (CA8 1988), must be reversed. This is consistent with our precedents and the basic principles defining judicial power.

In my view, however, the Court transgresses these same principles when it goes further, much further, to embrace by broad dictum an expansion of power in the Federal Judiciary beyond all precedent. Today's casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary dis-

[21] *United States* v. *County of Macon*, 99 U. S. 582 (1879), held that mandamus would not lie to force a local government to levy taxes in excess of the limits contained in a statute in effect at the time the county incurred its bonded indebtedness, for the explicit limitation on the taxing power became part of the contract, the bondholders had notice of the limitation and were deemed to have consented to it, and hence no contractual remedy was unconstitutionally impaired by observing the statute. *County of Macon* has little relevance to the present case, for KCMSD's obligation to fund the desegregation remedy arises from its operation of a segregated school system in violation of the Constitution, not from a contract between KCMSD and respondents.

regards fundamental precepts for the democratic control of public institutions. I cannot acquiesce in the majority's statements on this point, and should there arise an actual dispute over the collection of taxes as here contemplated in a case that is not, like this one, premature, we should not confirm the outcome of premises adopted with so little constitutional justification. The Court's statements, in my view, cannot be seen as necessary for its judgment, or as precedent for the future, and I cannot join Parts III and IV of the Court's opinion.

I

Some essential litigation history is necessary for a full understanding of what is at stake here and what will be wrought if the implications of all the Court's statements are followed to the full extent. The District Court's remedial plan was proposed for the most part by the Kansas City, Missouri, School District (KCMSD) itself, which is in name a defendant in the suit. Defendants, and above all defendants that are public entities, act in the highest and best tradition of our legal system when they acknowledge fault and cooperate to suggest remedies. But in the context of this dispute, it is of vital importance to note the KCMSD demonstrated little concern for the fiscal consequences of the remedy that it helped design.

As the District Court acknowledged, the plaintiffs and the KCMSD pursued a "friendly adversary" relationship. Throughout the remedial phase of the litigation, the KCMSD proposed ever more expensive capital improvements with the agreement of the plaintiffs, and the State objected. Some of these improvements involved basic repairs to deteriorating facilities within the school system. The KCMSD, however, devised a broader concept for districtwide improvement, and the District Court approved it. The plan involved a variation of the magnet school concept. Magnet schools, as the majority opinion notes, *ante*, at 40, n. 6, offer special pro-

grams, often used to encourage voluntary movement of students within the district in a pattern that aids desegregation.

Although we have approved desegregation plans involving magnet schools of this conventional definition, see *Milliken* v. *Bradley*, 433 U. S. 267, 272 (1977), the District Court found this insufficient. App. to Pet. for Cert. 122a. Instead, the court and the KCMSD decided to make a magnet of the district as a whole. The hope was to draw new nonminority students from outside the district. The KCMSD plan adopted by the court provided that "every senior high school, every middle school, and approximately one-half of the elementary schools in the KCMSD will become magnet schools by the school year 1991–92." *Id.*, at 121a. The plan was intended to "improve the quality of education of all KCMSD students." *Id.*, at 103a. The District Court was candid to acknowledge that the "long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." *Id.*, at 145a–146a (emphasis in original).

It comes as no surprise that the cost of this approach to the remedy far exceeded KCMSD's budget, or for that matter, its authority to tax. A few examples are illustrative. Programs such as a "performing arts middle school," *id.*, at 118a, a "technical magnet high school" that "will offer programs ranging from heating and air conditioning to cosmetology to robotics," *id.*, at 75a, were approved. The plan also included a "25 acre farm and 25 acre wildland area" for science study. *Id.*, at 20a. The court rejected various proposals by the State to make "capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment," because these proposals failed to "consider the criteria of suburban comparability." *Id.*, at 70a. The District Court stated: "This 'patch and repair' approach proposed by the State would not achieve suburban comparability or the

visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint." *Id.*, at 70a. Finding that construction of new schools would result in more "attractive" facilities than renovation of existing ones, the District Court approved new construction at a cost ranging from $61.80 per square foot to $95.70 per square foot as distinct from renovation at $45 per square foot. *Id.*, at 76a.

By the time of the order at issue here, the District Court's remedies included some "$260 million in capital improvements and a magnet-school plan costing over $200 million." *Missouri* v. *Jenkins*, 491 U. S. 274, 276 (1989). And the remedial orders grew more expensive as shortfalls in revenue became more severe. As the Eighth Circuit judges dissenting from denial of rehearing in banc put it: "The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country." 855 F. 2d, at 1318–1319.

The judicial taxation approved by the Eighth Circuit is also without parallel. Other Circuits that have faced funding problems arising from remedial decrees have concluded that, while courts have undoubted power to order that schools operate in compliance with the Constitution, the manner and methods of school financing are beyond federal judicial authority. See *National City Bank* v. *Battisti*, 581 F. 2d 565 (CA6 1977); *Plaquemines Parish School Bd.* v. *United States*, 415 F. 2d 817 (CA5 1969). The Third Circuit, while leaving open the possibility that in some situation a court-ordered tax might be appropriate, has also declined to approve judicial interference in taxation. *Evans* v. *Buchanan*, 582 F. 2d 750 (1978), cert. denied *sub nom. Alexis I. du Pont*

School Dist. v. *Evans*, 446 U. S. 923 (1980). The Sixth Circuit, in a somewhat different context, has recognized the severe intrusion caused by federal court interference in state and local financing. *Kelley* v. *Metropolitan County Bd. of Education of Nashville and Davidson County, Tenn.*, 836 F. 2d 986 (1987), cert. denied, 487 U. S. 1206 (1988).

Unlike these other courts, the Eighth Circuit has endorsed judicial taxation, first in dicta from cases in which taxation orders were in fact disapproved. *United States* v. *Missouri*, 515 F. 2d 1365, 1372–1373 (1975) (District Court may "implement its desegregation order by directing that provision be made for the levying of taxes"); *Liddell* v. *Missouri*, 731 F. 2d 1294, 1320, cert. denied *sub nom. Leggett* v. *Liddell*, 469 U. S. 816 (1984) (District Court may impose tax "after exploration of every other fiscal alternative"). The case before us represents the first in which a lower federal court has in fact upheld taxation to fund a remedial decree.

For reasons explained below, I agree with the Court that the Eighth Circuit's judgment affirming the District Court's direct levy of a property tax must be reversed. I cannot agree, however, that we "stand on different ground when we review the modifications to the District Court's order made by the Court of Appeals," *ante*, at 52. At the outset, it must be noted that the Court of Appeals made no "modifications" to the District Court's order. Rather, it affirmed "the actions that the court has taken to this point." 855 F. 2d, at 1314. It is true that the Court of Appeals went on "to consider the procedures which the district court should use *in the future*." *Ibid.* (emphasis added). But the Court of Appeals' entire discussion of "a preferable method for future funding," *ibid.*, can be considered no more than dictum, the court itself having already upheld the District Court's actions to date. No other order of the District Court was before the Court of Appeals.

The Court states that the Court of Appeals' discussion of future taxation was not dictum because although the Court of

Appeals "did not require the District Court to reverse the tax increase that it had imposed for prior fiscal years," it "required the District Court to use the less obtrusive procedures beginning with the fiscal year commencing after the remand." *Ante*, at 52–53, n. 18. But no such distinction is found in the Court of Appeals' opinion. Rather, the court "affirm[ed] the actions that the [district] court has taken to this point," which included the District Court's October 27, 1987, order increasing property taxes in the KCMSD *through the end of fiscal year 1991–1992*. The District Court's January 3, 1989, order does not support, but refutes, the Court's characterization. The District Court rejected a request by the KCMSD to *increase* the property tax rate using the method endorsed by the Eighth Circuit from $4 to $4.23 per $100 of assessed valuation. The District Court reasoned that an increase in 1988 property taxes would be difficult to administer and cause resentment among taxpayers, and that an increase in 1989 property taxes would be premature because it was not yet known whether an increase would be necessary to fund expenditures. App. 511–512. In rejecting the KCMSD's request, the District Court left in effect the $4 rate it had established in its October 27, 1987, order.

Whatever the Court thinks of the Court of Appeals' opinion, the District Court on remand appears to have thought it was under no compulsion to disturb its existing order establishing the $4 property tax rate through fiscal year 1991–1992 unless and until it became necessary to *raise* property taxes even higher. The Court's discussion today, and its stated approval of the "method for future funding" found "preferable" by the Court of Appeals, is unnecessary for the decision in this case. As the Court chooses to discuss the question of future taxation, however, I must state my respectful disagreement with its analysis and conclusions on this vital question.

The premise of the Court's analysis, I submit, is infirm. Any purported distinction between direct imposition of a tax

by the federal court and an order commanding the school district to impose the tax is but a convenient formalism where the court's action is predicated on elimination of state-law limitations on the school district's taxing authority. As the Court describes it, the local KCMSD possesses plenary taxing powers, which allow it to impose any tax it chooses if not "hinder[ed]" by the Missouri Constitution and state statutes. *Ante*, at 57. This puts the conclusion before the premise. Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri. See Mo. Const., Art. X, § 1 (political subdivisions may exercise only "[tax] power granted to them" by Missouri General Assembly). Under Missouri law, the KCMSD has power to impose a limited property tax levy up to $1.25 per $100 of assessed value. The power to exact a higher rate of property tax remains with the people, a majority of whom must agree to empower the KCMSD to increase the levy up to $3.75 per $100, and two-thirds of whom must agree for the levy to go higher. See Mo. Const., Art. X, §§ 11(b),(c). The Missouri Constitution states that "[p]roperty taxes and other local taxes . . . may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." Mo. Const., Art. X, § 16.

For this reason, I reject the artificial suggestion that the District Court may, by "prevent[ing] . . . officials from applying state law that would interfere with the willing levy of property taxes by KCMSD," *ante*, at 56, n. 20, cause the KCMSD to exercise power under *state* law. State laws, including taxation provisions legitimate and constitutional in themselves, define the power of the KCMSD. Cf. *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 695 (1979) (whether a state agency "may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful"). Absent a change in state law, no increase in property taxes could take

place in the KCMSD without a federal court order. It makes no difference that the KCMSD stands "ready, willing, and . . . able" to impose a tax not authorized by state law. *Ante*, at 51. Whatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court. The Court never confronts the judicial authority to issue an order for this purpose. Absent a change in state law, the tax is imposed by federal authority under a federal decree. The question is whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD.

II

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The description of the judicial power nowhere includes the word "tax" or anything that resembles it. This reflects the Framers' understanding that taxation was not a proper area for judicial involvement. "The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." The Federalist No. 78, p. 523 (J. Cooke ed. 1961) (A. Hamilton).

Our cases throughout the years leave no doubt that taxation is not a judicial function. Last Term we rejected the invitation to cure an unconstitutional tax scheme by broadening the class of those taxed. We said that such a remedy "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 818 (1989). Our statement in *Davis* rested on the explicit holding in *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961), in which we reversed a judgment directing a District Court to decree a valid tax in place of an invalid one that the State had attempted to enforce:

> "The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Id.*, at 752.

The nature of the District Court's order here reveals that it is not a proper exercise of the judicial power. The exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the Court. The order at issue here is not of this character. It binds the broad class of all KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit. For this reason, the District Court's direct order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process.

Taxation by a legislature raises no due process concerns, for the citizens' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Co.* v. *Colorado State Bd. of Equalization*, 239 U. S. 441, 445 (1915). The citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent. A true exercise of judicial power provides due process of another sort. Where money is extracted from parties by a court's judgment, the adjudication itself provides the notice and opportunity to be heard that due process demands before a citizen may be deprived of property.

The order here provides neither of these protections. Where a tax is imposed by a governmental body other than

the legislature, even an administrative agency to which the legislature has delegated taxing authority, due process requires notice to the citizens to be taxed and some opportunity to be heard. See, *e. g.*, *Londoner* v. *Denver*, 210 U. S. 373, 385–386 (1908). The citizens whose tax bills would have been doubled under the District Court's direct tax order would not have had these protections. The taxes were imposed by a District Court that was not "representative" in any sense, and the individual citizens of the KCMSD whose property (they later learned) was at stake were neither served with process nor heard in court. The method of taxation endorsed by today's dicta suffers the same flaw, for a district court order that overrides the citizens' state-law protection against taxation without referendum approval can in no sense provide representational due process. No one suggests the KCMSD taxpayers are parties.

A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature. The location of the federal taxing power sheds light on today's attempt to approve judicial taxation at the local level. Article I, § 1, states that "*[a]ll* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added.) The list of legislative powers in Article I, § 8, cl. 1, begins with the statement that "[t]he *Congress* shall have Power To lay and collect Taxes. . . ." As we have said, "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." *National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336, 340 (1974) (citing Article I, § 8, cl. 1).

True, today's case is not an instance of one branch of the Federal Government invading the province of another. It is instead one that brings the weight of federal authority upon a local government and a State. This does not detract, however, from the fundamental point that the Judiciary is not free to exercise all federal power; it may exercise only the

judicial power. And the important effects of the taxation order discussed here raise additional federalism concerns that counsel against the Court's analysis.

In perhaps the leading case concerning desegregation remedies, *Milliken* v. *Bradley*, 433 U. S. 267 (1977), we upheld a prospective remedial plan, not a "money judgment," *ante*, at 54, against a State's claim that principles of federalism had been ignored in the plan's implementation. In so doing the Court emphasized that the District Court had "neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." 433 U. S., at 291. No such assurances emerge from today's decision, which endorses federal-court intrusion into these precise matters. Our statement in a case decided more than 100 years ago should apply here.

> "This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees* v. *City of Watertown*, 19 Wall. 107, 116–117 (1874).

The confinement of taxation to the legislative branches, both in our Federal and State Governments, was not random. It reflected our ideal that the power of taxation must be under the control of those who are taxed. This truth animated all our colonial and revolutionary history.

> "Your Memorialists conceive it to be a fundamental Principle . . . without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent, or by those who are legally appointed to represent them: Property must become too precarious for the Genius of a free People

> which can be taken from them at the Will of others, who cannot know what Taxes such people can bear, or the easiest Mode of raising them; and who are not under that Restraint, which is the greatest Security against a burthensome Taxation, when the Representatives themselves must be affected by every tax imposed on the People." Virginia Petitions to King and Parliament, December 18, 1764, reprinted in The Stamp Act Crisis 41 (E. Morgan ed. 1952).

The power of taxation is one that the Federal Judiciary does not possess. In our system "the legislative department alone has access to the pockets of the people," The Federalist No. 48, p. 334 (J. Cooke ed. 1961) (J. Madison), for it is the Legislature that is accountable to them and represents their will. The authority that would levy the tax at issue here shares none of these qualities. Our Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. Federal judges do not depend on the popular will for their office. They may not even share the burden of taxes they attempt to impose, for they may live outside the jurisdiction their orders affect. And federal judges have no fear that the competition for scarce public resources could result in a diminution of their salaries. It is not surprising that imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens.

The operation of tax systems is among the most difficult aspects of public administration. It is not a function the Judiciary as an institution is designed to exercise. Unlike legislative bodies, which may hold hearings on how best to raise revenues, all subject to the views of constituents to whom the Legislature is accountable, the Judiciary must grope ahead with only the assistance of the parties, or perhaps random *amici curiae*. Those hearings would be without principled direction, for there exists no body of juridical axioms by

which to guide or review them. On this questionable basis, the Court today would give authority for decisions that affect the life plans of local citizens, the revenue available for competing public needs, and the health of the local economy.

Day-to-day administration of the tax must be accomplished by judicial trial and error, requisitioning the staff of the existing tax authority, or the hiring of a staff under the direction of the judge. The District Court orders in this case suggest the pitfalls of the first course. See App. to Pet. for Cert. 55a (correcting order for assessment of penalties for nonpayment that "mistakenly" assessed penalties on an extra tax year); *id.*, at 57a ("clarify[ing]" the inclusion of savings and loan institutions, estates, trusts, and beneficiaries in the court's income tax surcharge and enforcement procedures). Forcing citizens to make financial decisions in fear of the fledgling judicial tax collector's next misstep must detract from the dignity and independence of the federal courts.

The function of hiring and supervising a staff for what is essentially a political function has other complications. As part of its remedial order, for example, the District Court ordered the hiring of a "public information specialist," at a cost of $30,000. The purpose of the position was to "solicit community support and involvement" in the District Court's desegregation plan. See *id.*, at 191a. This type of order raises a substantial question whether a district court may extract taxes from citizens who have no right of representation and then use the funds for expression with which the citizens may disagree. Cf. *Abood* v. *Detroit Bd. of Education*, 431 U. S. 209 (1977).

The Court relies on dicta from *Griffin* v. *Prince Edward County School Bd.*, 377 U. S. 218 (1964), to support its statements on judicial taxation. In *Griffin*, the Court faced an unrepentent and recalcitrant school board that attempted to provide financial support for white schools while refusing to operate schools for black schoolchildren. We stated that the District Court could "require the Supervisors to exercise the

power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Id.*, at 233 (emphasis added). There is no occasion in this case to discuss the full implications of *Griffin*'s observation, for it has no application here. *Griffin* endorsed the power of a federal court to order the local authority to exercise *existing* authority to tax.

This case does not involve an order to a local government with plenary taxing power to impose a tax, or an order directed at one whose taxing power has been limited by a state law enacted in order to thwart a federal court order. An order of this type would find support in the *Griffin* dicta and present a closer question than the one before us. Yet that order might implicate as well the "perversion of the normal legislative process" that we have found troubling in other contexts. See *Spallone* v. *United States*, 493 U. S. 265, 280 (1990). A legislative vote taken under judicial compulsion blurs lines of accountability by making it appear that a decision was reached by elected representatives when the reality is otherwise. For this reason, it is difficult to see the difference between an order to tax and direct judicial imposition of a tax.

The Court asserts that its understanding of *Griffin* follows from cases in which the Court upheld the use of mandamus to compel local officials to collect taxes that were authorized under state law in order to meet bond obligations. See *ante*, at 55–57. But as discussed *supra*, at 63–65, there was no state authority in this case for the KCMSD to exercise. In this situation, there could be no authority for a judicial order touching on taxation. See *United States* v. *County of Macon*, 99 U. S. 582, 591 (1879) (where the statute empowering the corporation to issue bonds contains a limit on the taxing power, federal court has no power of mandamus to compel a levy in excess of that power; "We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new

rights or confer new powers. All we can do is to bring existing powers into operation").

The Court cites a single case, *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1867), for the proposition that a federal court may set aside state taxation limits that interfere with the remedy sought by the district court. But the Court does not heed *Von Hoffman*'s holding. There a municipality had authorized a tax levy in support of a specific bond obligation, but later limited the taxation authority in a way that impaired the bond obligation. The Court held the subsequent limitation itself unconstitutional, a violation of the Contracts Clause. Once the limitation was held invalid, the original specific grant of authority remained. There is no allegation here, nor could there be, that the neutral tax limitations imposed by the people of Missouri are unconstitutional. Compare Tr. of Oral Arg. 41 ("nothing in the record to suggest" that tax limitation was intended to frustrate desegregation) with *Griffin*, *supra*, at 221 (State Constitution amended as part of state and school district plan to resist desegregation). The majority appears to concede that the Missouri tax law does not violate a specific provision of the Constitution, stating instead that state laws may be disregarded on the basis of a vague "reason based in the Constitution." *Ante*, at 57. But this broad suggestion does not follow from the holding in *Von Hoffman*.

Examination of the "long and venerable line of cases," *ante*, at 55, cited by the Court to endorse judicial taxation reveals the lack of real support for the Court's rationale. One group of these cases holds simply that the common-law writ of mandamus lies to compel a local official to perform a clear duty imposed by state law. See *United States* v. *New Orleans*, 98 U. S. 381 (1879) (reaffirming legislative nature of the taxing power and the availability of mandamus to compel officers to levy a tax where they were required by state law to do so); *City of Galena* v. *Amy*, 5 Wall. 705 (1867) (mandamus to state officials to collect a tax authorized by state law

in order to fund a state bond obligation); *Board of Commissioners of Knox County* v. *Aspinwall*, 24 How. 376 (1861) (state statute gave tax officials authority to levy the tax needed to satisfy a bond obligation and explicitly required them to do so; mandamus was proper to compel performance of this "plain duty" under state law). These common-law mandamus decisions do not purport to involve the Federal Constitution or remedial powers.

A second set of cases, including the *Von Hoffman* case relied upon by the Court, invalidates on Contracts Clause grounds statutory limitations on taxation power passed subsequent to grants of tax authority in support of bond obligations. See *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U. S. 170 (1909) (state law authorized municipal tax in support of bond obligation; subsequent legislation removing the authority is invalid under Contracts Clause, and mandamus will lie against municipal official to collect the tax); *Graham* v. *Folsom*, 200 U. S. 248 (1906) (where state municipality enters into a bond obligation based on delegated state power to collect a tax, State may not by subsequent abolition of the municipality remove the taxing power; such an act is itself invalid as a violation of the Contracts Clause); *Wolff* v. *New Orleans*, 103 U. S. 358 (1881) (same). These cases, like *Von Hoffman*, are inapposite because there is no colorable argument that the provision of the Missouri Constitution limiting property tax assessments itself violates the Federal Constitution.

A third group of cases involving taxation and municipal bonds is more relevant. These cases hold that where there is no state or municipal taxation authority that the federal court may by mandamus command the officials to exercise, the court is itself without authority to order taxation. In some of these cases, the officials charged with administering the tax resigned their positions, and the Court held that no judicial remedy was available. See *Heine* v. *Levee Commissioners*, 19 Wall. 655 (1874) (where the levee commissioners

had resigned their office no one remained on whom the mandamus could operate). In *Heine*, the Court held that it had no equitable power to impose a tax in order to prevent the plaintiff's right from going without a remedy.

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. . . . It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." *Id.*, at 660–661.

Other cases state more broadly that absent state authority for a tax levy, the exercise of which may be compelled by mandamus, the federal court is without power to impose any tax. See *Meriwether* v. *Garrett*, 102 U. S. 472 (1880) (where State repealed municipal charter, federal court had no authority to impose taxes, which may be collected only under authority from the legislature); *id.*, at 515 (Field, J., concurring in judgment) ("The levying of taxes is not a judicial act. It has no elements of one"); *United States* v. *County of Macon*, 99 U. S. 582 (1879) (no authority to compel a levy higher than state law allowed outside situation where a subsequent limitation violated Contracts Clause); *Rees* v. *City of Watertown*, 19 Wall. 107 (1874) (holding mandamus unavailable where officials have resigned, and that tax limitation in effect when bond obligation was undertaken may not be exceeded by court order).

With all respect, it is this third group of cases that applies. The majority would limit these authorities to a narrow "ex-

ceptio[n]" for cases where local officers resigned. *Ante*, at 56, n. 20. This is not an accurate description. Rather, the cases show that where a limitation on the local authority's taxing power is not a subsequent enactment itself in violation of the Contracts Clause, a federal court is without power to order a tax levy that goes beyond the authority granted by state law. The Court states that the KCMSD *was* "invested with authority to collect and disburse the property tax." *Ibid.* Invested by whom? It is plain that the KCMSD had no such power under state law. That being so, the authority to levy a higher tax would have to come from the federal court. The very cases cited by the majority show that a federal court has no such authority.

At bottom, today's discussion seems motivated by the fear that failure to endorse judicial taxation power might in some extreme circumstance leave a court unable to remedy a constitutional violation. As I discuss below, I do not think this possibility is in reality a significant one. More important, this possibility is nothing more or less than the necessary consequence of *any* limit on judicial power. If, however, judicial discretion is to provide the sole limit on judicial remedies, that discretion must counsel restraint. Ill-considered entry into the volatile field of taxation is a step that may place at risk the legitimacy that justifies judicial independence.

III

One of the most troubling aspects of the Court's opinion is that discussion of the important constitutional issues of judicial authority to tax need never have been undertaken to decide this case. Even were I willing to accept the Court's proposition that a federal court might in some extreme case authorize taxation, this case is not the one. The suggestion that failure to approve judicial taxation here would leave constitutional rights unvindicated rests on a presumption that the District Court's remedy is the *only* possible cure for the constitutional violations it found. Neither our precedents

nor the record support this view. In fact, the taxation power is sought here on behalf of a remedial order unlike any before seen.

It cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court's orders, is itself a constitutional command. We have long since determined that "unequal expenditures between children who happen to reside in different districts" do not violate the Equal Protection Clause. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 54–55 (1973). The District Court in this case found, and the Court of Appeals affirmed, that there was no interdistrict constitutional violation that would support mandatory interdistrict relief. See *Jenkins* v. *Missouri*, 807 F. 2d 657 (CA8 1986). Instead, the District Court's conclusion that desegregation might be easier if more nonminority students could be attracted into the KCMSD was used as the hook on which to hang numerous policy choices about improving the quality of education in general within the KCMSD. The State's complaint that this suit represents the attempt of a school district that could not obtain public support for increased spending to enlist the District Court to finance its educational policy cannot be dismissed out of hand. The plaintiffs and KCMSD might well be seen as parties that have "joined forces apparently for the purpose of extracting funds from the state treasury." *Milliken* v. *Bradley*, 433 U. S., at 293 (Powell, J., concurring in judgment).

This Court has never approved a remedy of the type adopted by the District Court. There are strong arguments against the validity of such a plan. A remedy that uses the quality of education as a lure to attract nonminority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities. Such a plan as a practical matter raises many of the concerns involved in interdistrict desegregation remedies. Cf. *Milliken* v. *Bradley*, 418 U. S. 717

(1974) (invalidating interdistrict remedial plan). District courts can and must take needed steps to eliminate racial discrimination and ensure the operation of unitary school systems. But it is discrimination, not the ineptitude of educators or the indifference of the public, that is the evil to be remedied. An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers, and elected officials to an unaccountable district judge whose province is law, not education.

Perhaps it is good educational policy to provide a school district with the items included in the KCMSD capital improvement plan, for example: high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities. But these items are a part of legitimate political debate over educational policy and spending priorities, not the Constitution's command of racial equality. Indeed, it may be that a mere 12-acre petting farm, or other corresponding reductions in court-ordered spending, might satisfy constitutional requirements, while preserving scarce public funds for legislative allocation to other public needs, such as paving streets, feeding the poor, building prisons, or housing the homeless. Perhaps the KCMSD's Classical Greek theme schools emphasizing forensics and self-government will provide exemplary training in participatory democracy. But if today's dicta become law, such lessons will be of little use to students who grow up to become taxpayers in the KCMSD.

I am required in light of our limited grant of certiorari to assume that the remedy chosen by the District Court was a permissible exercise of its remedial discretion. But it is misleading to suggest that a failure to fund this particular remedy would leave constitutional rights without a remedy. In fact, the District Court acknowledged in its very first remedial order that the development of a remedy in this case would involve "a choice among a wide range of possibilities." App. to Pet. for Cert. 153a. Its observation was consistent with our cases concerning the scope of equitable remedies, which have recognized that "equity has been characterized by a practical flexibility in shaping its remedies." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

Any argument that the remedy chosen by the District Court was the only one possible is in fact unsupportable in light of our previous cases. We have approved desegregation orders using assignment changes and some ancillary education programs to ensure the operation of a unitary school system for the district's children. See, *e. g.*, *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449 (1979); *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406 (1977). To suggest that a constitutional violation will go unremedied if a district does not, though capital improvements or other means, turn every school into a magnet school, and the entire district into a magnet district, is to suggest that the remedies approved in our past cases should have been disapproved as insufficient to deal with the violations. The truth of the matter is that the remedies in those cases were permissible choices among the many that might be adopted by a district court.

The prudence we have required in other areas touching on federal court intrusion in local government, see, *e. g.*, *Spallone* v. *United States*, 493 U. S. 265 (1990), is missing here. Even on the assumption that a federal court might order taxation in an extreme case, the unique nature of the taxing power would demand that this remedy be used as a last resort. In my view, a taxation order should not even be

considered, and this Court need never have addressed the question, unless there has been a finding that without the particular remedy at issue the constitutional violation will go unremedied. By this I do not mean that the remedy is, as we assume this one was, within the broad discretion of the district court. Rather, as a prerequisite to considering a taxation order, I would require a finding that that any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion. There is no showing in this record that, faced with the revenue shortfall, the District Court gave due consideration to the possibility that another remedy among the "wide range of possibilities" would have addressed the constitutional violations without giving rise to a funding crisis.

The District Court here did consider alternatives to the taxing measures it imposed, but only *funding* alternatives. See, *e. g.*, App. to Pet. for Cert. 86a. There is no indication in the record that the District Court gave any consideration to the possibility that an alternative remedial plan, while less attractive from an educational policy viewpoint, might nonetheless suffice to cure the constitutional violation. Rather, it found only that the taxation orders were necessary to fund the particular remedy it had devised. This Court, with full justification, has given latitude to the district judges that must deal with persisting problems of desegregation. Even when faced with open defiance of the mandate of educational equality, however, no court has ever found necessary a remedy of the scope presented here. For this reason, no order of taxation has ever been approved. The Court fails to provide any explanation why this case presents the need to endorse by dictum so drastic a step.

The suggestion that our limited grant of certiorari requires us to decide this case blinkered as to the actual remedy underlying it, *ante*, at 53, is ill founded. A limited grant of certiorari is not a means by which the Court can pose for itself

an abstract question. Our jurisdiction is limited to particular cases and controversies. U. S. Const., Art. III, § 2, cl. 1. The only question this Court has authority to address is whether a judicial tax was appropriate *in this case*. Moreover, the petition for certiorari in this case included the contention that the District Court should not have considered the power to tax before considering whether its choice of remedy was the only possible way to achieve desegregation as a part of its argument on Question 2, which the Court granted. Pet. for Cert. 27. Far from being an improper invitation to go outside the question presented, attention to the extraordinary remedy here is the Court's duty. This would be a far more prudent course than recharacterizing the case in an attempt to reach premature decision on an important question. If the Court is to take upon itself the power to tax, respect for its own integrity demands that the power be exercised in support of true constitutional principle, not "suburban comparability" and "visual attractiveness."

IV

This case is a stark illustration of the ever-present question whether ends justify means. Few ends are more important than enforcing the guarantee of equal educational opportunity for our Nation's children. But rules of taxation that override state political structures not themselves subject to any constitutional infirmity raise serious questions of federal authority, questions compounded by the odd posture of a case in which the Court assumes the validity of a novel conception of desegregation remedies we never before have approved. The historical record of voluntary compliance with the decree of *Brown* v. *Board of Education* is not a proud chapter in our constitutional history, and the judges of the District Courts and Courts of Appeals have been courageous and skillful in implementing its mandate. But courage and skill must be exercised with due regard for the proper and historic role of the courts.

I do not acknowledge the troubling departures in today's majority opinion as either necessary or appropriate to ensure full compliance with the Equal Protection Clause and its mandate to eliminate the cause and effects of racial discrimination in the schools. Indeed, while this case happens to arise in the compelling context of school desegregation, the principles involved are not limited to that context. There is no obvious limit to today's discussion that would prevent judicial taxation in cases involving prisons, hospitals, or other public institutions, or indeed to pay a large damages award levied against a municipality under 42 U. S. C. § 1983. This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies.

James Madison observed: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." The Federalist, No. 51, p. 352 (J. Cooke ed. 1961). In pursuing the demand of justice for racial equality, I fear that the Court today loses sight of other basic political liberties guaranteed by our constitutional system, liberties that can coexist with a proper exercise of judicial remedial powers adequate to correct constitutional violations.

VENEGAS *v.* MITCHELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–1725. Argued February 21, 1990—Decided April 18, 1990

In connection with petitioner Venegas' civil rights suit under 42 U. S. C. § 1983, he and respondent Mitchell, an attorney, entered into a contingent-fee contract providing that, *inter alia*, Mitchell would receive a percentage of any gross recovery, which would be offset by any court-awarded attorney's fees, and would be allowed to intervene in the action to protect the fee award. Venegas obtained a judgment and was awarded attorney's fees, $75,000 of which was attributable to work done by Mitchell. The fees were awarded under § 1988, which enables civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves by authorizing the payment of a "reasonable attorney's fee" by a losing party to a prevailing party. After Venegas obtained different counsel to handle his appeal, Mitchell filed a motion for leave to intervene, requesting that the District Court confirm a lien on the judgment for $406,000 in fees that were purportedly due him under the contract. Among other things, the court held that he was not entitled to intervene, but it refused to disallow or reduce the contingent fee, holding that it was reasonable and not a windfall to Mitchell. The Court of Appeals reversed the District Court's holding denying intervention, but agreed that § 1988 does not prevent a lawyer from collecting a reasonable contingent fee even if it exceeds the statutory fee award and that Mitchell's fee was reasonable and not a windfall.

Held:

1. Section 1988 does not invalidate contingent-fee contracts that would require a prevailing plaintiff to pay his attorney more than the statutory award against the defendant. Neither the section's language nor its legislative history supports the view that it prevents an attorney and client from entering into a contingent-fee agreement. Moreover, this Court, in holding that it is the prevailing *party*, rather than the lawyer, who is eligible for fees, has recognized that it is the party's right to waive, settle, or negotiate that eligibility, *Evans* v. *Jeff D.*, 475 U. S. 717, 730, and has implicitly accepted that statutory fee awards can coexist with private fee arrangements, cf., *Blanchard* v. *Bergeron*, 489 U. S. 87, 94–95; *Blum* v. *Stenson*, 465 U. S. 886, 894–895. Since a § 1983 cause of action also belongs to, and can be waived by, the injured party, a contrary finding would place these plaintiffs in the peculiar position of

having more freedom to negotiate a waiver of their causes of action with their adversaries than a fee with their own attorneys. The fact that *Blanchard* v. *Bergeron*, *supra*, does not permit a contingent-fee agreement to impose a ceiling on the amount of the statutory fee award does not mean that such an agreement should also be ignored for the benefit of the client so that he need pay only the statutory award. *Blanchard* dealt with what the losing party must pay the plaintiff, not with the contractual obligations of plaintiffs and their attorneys, and entitlement to a § 1988 award does not belong to the attorney. Also unpersuasive is Venegas' argument that requiring him to pay more than the reasonable fee authorized by Congress would greatly reduce his recovery and would impose a cost on him that the defendant should pay, since the amount payable under a fee agreement is not necessarily measured by the "reasonable attorney's fee" that a defendant must pay under § 1988, and since depriving prevailing plaintiffs of the option of promising to pay more to secure their counsel of choice would not further § 1988's general purpose of enabling them to secure competent counsel. Pp. 86–90.

2. Venegas offers no reason to accept his contention, rejected by the lower courts, that, even if contingent fees exceeding statutory awards are not prohibited *per se* by § 1988, the fee in this case is unreasonable under both federal and state law. P. 90.

867 F. 2d 527, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Richard M. Mosk argued the cause for petitioner. With him on the briefs was *Michael S. Bromberg*.

Charles A. Miller argued the cause for respondent. With him on the brief was *Bruce N. Kuhlik*.*

JUSTICE WHITE delivered the opinion of the Court.

Under 42 U. S. C. § 1988 (1982 ed.), a court may award a reasonable attorney's fee to the prevailing party in civil rights cases. We granted certiorari to resolve a conflict among the Courts of Appeals as to whether § 1988 invalidates contingent-fee contracts that would require a prevailing civil

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**Guy T. Saperstein*, *John A. Powell*, *Paul L. Hoffman*, *E. Richard Larson*, and *Theodore Eisenberg* filed a brief for Saperstein & Seligman et al. as *amici curiae* urging affirmance.

rights plaintiff to pay his attorney more than the statutory award against the defendant.[1]

I

This dispute arises out of an action brought by petitioner Venegas under 42 U. S. C. § 1983 (1982 ed.) in the United States District Court for the Central District of California, alleging that police officers of the city of Long Beach, California, falsely arrested Venegas and conspired to deny him a fair trial through the knowing presentation of perjured testimony. After an order of the District Court dismissing Venegas' complaint as barred by the statute of limitations was reversed by the Court of Appeals,[2] Venegas retained respondent Mitchell as his attorney. Venegas and Mitchell signed a contingent-fee contract providing that Mitchell would represent Venegas at trial for a fee of 40% of the gross amount of any recovery. The contract gave Mitchell "the right to apply for and collect any attorney fee award made by a court," App. to Brief in Opposition 3a, prohibited Venegas from waiving Mitchell's right to court-awarded attorney's fees, and allowed Mitchell's intervention to protect his interest in the the fee award. The contract also provided that any fee awarded by the court would be applied, dollar for dollar, to offset the contingent fee. The contract obligated Mitchell to provide his services for one trial only and stated that "[i]n the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of [Mitchell's] employment, but are not obligated to do so." *Id.*, at 1a.

[1] The Third, Eighth, and Ninth Circuits have held that civil rights plaintiffs may be required to pay their attorneys contingent fees exceeding a statutory award made under § 1988. *Sullivan* v. *Crown Paper Board Co.*, 719 F. 2d 667, 669–670 (CA3 1983); *Wilmington* v. *J. I. Case Co.*, 793 F. 2d 909, 923 (CA8 1986); *Venegas* v. *Skaggs*, 867 F. 2d 527 (CA9 1989). The Tenth Circuit has held that a § 1988 award places a ceiling on an attorney's permissible recovery under a contingent-fee agreement. *Cooper* v. *Singer*, 719 F. 2d 1496 (1983) (in banc).

[2] *Venegas* v. *Wagner*, 704 F. 2d 1144 (CA9 1983).

Venegas subsequently consented to the association of co-counsel with the understanding that co-counsel would share any contingent fee equally with Mitchell.

Venegas obtained a judgment in his favor of $2.08 million. Mitchell then moved for attorney's fees under § 1988, and on August 15, 1986, the District Court entered an order awarding Venegas $117,000 in attorney's fees, of which $75,000 was attributable to work done by Mitchell.[3] The District Court calculated the award for Mitchell's work by multiplying a reasonable hourly rate by the number of hours Mitchell expended on the case, and then doubling this lodestar figure to reflect Mitchell's competent performance. App. to Pet. for Cert. 28a. Negotiations between attorney and client about the possibility of Mitchell's representing Venegas on appeal broke down, and on September 14, 1986, Mitchell signed a stipulation withdrawing as counsel of record. Venegas obtained different counsel for the appeal.[4]

Mitchell then filed a motion for leave to intervene, which requested that the District Court confirm a lien on the judgment for the fees purportedly due him under the contingent-fee contract in the amount of $406,000. The District Court held that Mitchell had not established his entitlement either to intervention as of right under Federal Rule of Civil Procedure 24(a)(2) or to permissive intervention under Rule 24(b)(2), primarily because the court could discern no connection between Mitchell's asserted rights under the fee contract and the substance of Venegas' civil rights action. App. to Pet. for Cert. 23a. The court went on to state its view, however, that the contract did not expressly provide for a lien and declined to decide whether the contract gave rise to an implied equitable lien on Venegas' recovery because the judgment had been stayed pending appeal. The court remarked

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[3] *Venegas* v. *Skaggs*, No. CV 77-4047-RJK (CD Cal., Aug. 14, 1986), pp. 5–7.

[4] The Court of Appeals subsequently affirmed the judgment. *Venegas* v. *Wagner*, 831 F. 2d 1514 (CA9 1987).

that Mitchell could bring an action in state court to establish his lien, if and when the judgment for Venegas became final. *Id.*, at 26a. The District Court refused to disallow or reduce the contingent fee claimed by Mitchell, holding that in this case the fee contracted for was reasonable and not a windfall for the attorney. *Id.*, at 27a–29a.

On appeal, the Ninth Circuit ruled that the District Court had erred in denying Mitchell permissive intervention, 867 F. 2d 527, 531 (1989), but agreed, contrary to Venegas' submission, that § 1988 does not prevent the lawyer from collecting a reasonable fee provided for in a contingent-fee contract even if it exceeds the statutory award, *id.*, at 533. The Court of Appeals also agreed with the District Court that the fee provided for by the contract in this case was reasonable and not a mere windfall to Mitchell. Because the judgment in Venegas' favor had by that time been affirmed, the court remanded to the District Court to act on the merits of Mitchell's motion to confirm a lien on the recovery. We granted certiorari, 493 U. S. 806 (1989).

II

Section 1988 states in pertinent part that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The section by its terms authorized the trial court in this case to order the defendants to pay to Venegas, the prevailing party, a reasonable attorney's fee. The aim of the section, as our cases have explained, is to enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail. It is likely that in many, if not most, cases a lawyer will undertake a civil rights case on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i. e.*, a reasonable fee, if the case is won. But there is nothing in the section to regulate what plaintiffs

may or may not promise to pay their attorneys if they lose or if they win. Certainly § 1988 does not on its face prevent the plaintiff from promising an attorney a percentage of any money judgment that may be recovered. Nor has Venegas pointed to anything in the legislative history that persuades us that Congress intended § 1988 to limit civil rights plaintiffs' freedom to contract with their attorneys.

It is true that in construing § 1988, we have generally turned away from the contingent-fee model to the lodestar model of hours reasonably expended compensated at reasonable rates. See *Blanchard* v. *Bergeron*, 489 U. S. 87, 94 (1989); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 564 (1986) *(Delaware Valley I)*; *Riverside* v. *Rivera*, 477 U. S. 561, 574 (1986) (plurality opinion); *Blum* v. *Stenson*, 465 U. S. 886, 897 (1984). We may also assume for the purposes of deciding this case that § 1988 would not have authorized the District Court to enhance the statutory award upward from the lodestar figure based on the contingency of nonrecovery in this particular litigation. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 726 (1987) (plurality opinion) *(Delaware Valley II)*; *id.*, at 731 (O'CONNOR, J., concurring in part and concurring in judgment). But it is a mighty leap from these propositions to the conclusion that § 1988 also requires the District Court to invalidate a contingent-fee agreement arrived at privately between attorney and client. We have never held that § 1988 constrains the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff.

Indeed, our cases look the other way. Section 1988 makes the prevailing *party* eligible for a discretionary award of attorney's fees. *Evans* v. *Jeff D.*, 475 U. S. 717, 730 (1986). Because it is the party, rather than the lawyer, who is so eligible, we have consistently maintained that fees may be

awarded under § 1988 even to those plaintiffs who did not need them to maintain their litigation, either because they were fortunate enough to be able to retain counsel on a fee-paying basis, *Blanchard* v. *Bergeron*, *supra*, at 94–95, or because they were represented free of charge by nonprofit legal aid organizations, *Blum* v. *Stenson*, *supra*, at 894–895. We have therefore accepted, at least implicitly, that statutory awards of fees can coexist with private fee arrangements. See also *Delaware Valley II*, 483 U. S., at 726 (plurality opinion); *id.*, at 749 (BLACKMUN, J., dissenting). And just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate that eligibility. See *Evans* v. *Jeff D.*, *supra*, at 730–731.

Much the same is true of the substance of a money judgment recovered under § 1983 (exclusive of fees awarded under § 1988), of which the contingent fee in this case is a part. A cause of action under § 1983 belongs "to the injured individua[l]," *Newton* v. *Rumery*, 480 U. S. 386, 395 (1987) (plurality opinion), and in at least some circumstances that individual's voluntary waiver of a § 1983 cause of action may be valid. *Id.*, at 398 (plurality opinion); *id.*, at 403 (O'CONNOR, J., concurring in part and concurring in judgment). If § 1983 plaintiffs may waive their causes of action entirely, there is little reason to believe that they may not assign part of their recovery to an attorney if they believe that the contingency arrangement will increase their likelihood of recovery. A contrary decision would place § 1983 plaintiffs in the peculiar position of being freer to negotiate with their adversaries than with their own attorneys.

Relying heavily on *Blanchard* v. *Bergeron*, *supra*, Venegas argues that if a contingent-fee agreement does not impose a ceiling on the amount of a "court awarded fee which would go to the attorney" (as he understands the holding of *Blanchard*, see Brief for Petitioner 9), such a fee agreement

should also be ignored for the benefit of the client so that he need pay only the statutory award. There are two difficulties with this argument. First, *Blanchard* did not address contractual obligations of plaintiffs to their attorneys; it dealt only with what the losing defendant must pay the plaintiff, whatever might be the substance of the contract between the plaintiff and the attorney. Second, we have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff. See *Evans* v. *Jeff D.*, *supra*, at 731–732.

Venegas also argues that because Congress provided for a reasonable fee to be paid by the defendant so that "a plaintiff's recovery will not be reduced by what he must pay his counsel," *Blanchard*, 489 U. S., at 94, the plaintiff should be protected from paying the attorney any more than the reasonable fee awarded by the trial court. Otherwise, Venegas contends, paying the contingent fee in full would greatly reduce his recovery and would impose a cost on him for enforcing the civil rights laws, a cost that the defendant should pay. This argument, too, is wide of the mark. *Blanchard* also noted that "[p]laintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage" of § 1988. *Ibid.* Civil rights plaintiffs, if they prevail, will be entitled to an attorney's fee that Congress anticipated would enable them to secure reasonably competent counsel. If they take advantage of the system as Congress established it, they will avoid having their recovery reduced by contingent-fee agreements. But neither *Blanchard* nor any other of our cases has indicated that § 1988, by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further

§ 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.

In sum, § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attorney's fee" that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.

Venegas also argues that even if contingent fees exceeding statutory awards are not prohibited *per se* by § 1988, nonetheless the contingent fee in this case is unreasonable under federal and state law. Venegas made this contention to both lower courts, and both courts rejected it. We find no reason in the record or briefs to disturb their conclusion on this issue. We therefore have no occasion to address the extent of the federal courts' authority to supervise contingent fees.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

MINNESOTA *v.* OLSON

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 88–1916. Argued February 26, 1990—Decided April 18, 1990

Police suspected respondent Olson of being the driver of the getaway car used in a robbery-murder. After recovering the murder weapon and arresting the suspected murderer, they surrounded the home of two women with whom they believed Olson had been staying. When police telephoned the home and told one of the women that Olson should come out, a male voice was heard saying, "tell them I left." Without seeking permission and with weapons drawn, they entered the home, found Olson hiding in a closet, and arrested him. Shortly thereafter, he made an inculpatory statement, which the trial court refused to suppress. He was convicted of murder, armed robbery, and assault. The Minnesota Supreme Court reversed, ruling that Olson had a sufficient interest in the women's home to challenge the legality of his warrantless arrest, that the arrest was illegal because there were no exigent circumstances to justify warrantless entry, and that his statement was tainted and should have been suppressed.

Held: The arrest violated Olson's Fourth Amendment rights. Pp. 95–101.

(a) Olson's status as an overnight guest is alone sufficient to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable. See *Rakas* v. *Illinois*, 439 U. S. 128, 143–144; cf. *Jones* v. *United States*, 362 U. S. 257. The distinctions relied on by the State between this case and *Jones*—that, there, the overnight guest was left alone and had a key to the premises with which he could come and go and admit and exclude others—are not legally determinative. All citizens share the expectation that hosts will more likely than not respect their guests' privacy interests even if the guests have no legal interest in the premises and do not have the legal authority to determine who may enter the household. Pp. 95–100.

(b) The State Supreme Court applied essentially the correct standard in holding that there were no exigent circumstances justifying the warrantless entry: An entry may be justified by hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or others; but, in the absence of hot pursuit, there must be at least probable cause to believe that one or more of the other factors were present and, in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is

armed should be considered. This Court is not inclined to disagree with the fact-specific application of this standard by the lower court, which pointed out that, although a grave crime was involved, Olson was known not to be the murderer and the murder weapon had been recovered; that there was no suggestion of danger to the women; that several police squads surrounded the house; that it was Sunday afternoon; that it was evident that the suspect was going nowhere; and that if he came out of the house he would have been promptly apprehended. Pp. 100–101.

436 N. W. 2d 92, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., *post*, p. 101, and KENNEDY, J., *post*, p. 102, filed concurring opinions. REHNQUIST, C. J., and BLACKMUN, J., dissented.

Anne E. Peek argued the cause for petitioner. With her on the briefs were *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Thomas L. Johnson*.

Stephen J. Marzen argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Bryson*.

Glenn P. Bruder, by appointment of the Court, 493 U. S. 989, argued the cause for respondent.*

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*A brief of *amici curiae* urging reversal was filed for the State of Connecticut et al. by *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *Frank J. Kelley*, Attorney General of Michigan, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *John P. Arnold*, Attorney General of New Hampshire, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Joseph B. Meyer*, Attorney General of Wyoming, *James B. Early*, Special Assistant Attorney General of Minnesota, *George D. Webster*, *Jack E. Yelverton*, and *Gregory U. Evans*.

JUSTICE WHITE delivered the opinion of the Court.

The police in this case made a warrantless, nonconsensual entry into a house where respondent Robert Olson was an overnight guest and arrested him. The issue is whether the arrest violated Olson's Fourth Amendment rights. We hold that it did.

I

Shortly before 6 a.m. on Saturday, July 18, 1987, a lone gunman robbed an Amoco gasoline station in Minneapolis, Minnesota, and fatally shot the station manager. A police officer heard the police dispatcher report and suspected Joseph Ecker. The officer and his partner drove immediately to Ecker's home, arriving at about the same time that an Oldsmobile arrived. The driver of the Oldsmobile took evasive action, and the car spun out of control and came to a stop. Two men fled the car on foot. Ecker, who was later identified as the gunman, was captured shortly thereafter inside his home. The second man escaped.

Inside the abandoned Oldsmobile, police found a sack of money and the murder weapon. They also found a title certificate with the name Rob Olson crossed out as a secured party, a letter addressed to a Roger R. Olson of 3151 Johnson Street, and a videotape rental receipt made out to Rob Olson and dated two days earlier. The police verified that a Robert Olson lived at 3151 Johnson Street.

The next morning, Sunday, July 19, a woman identifying herself as Dianna Murphy called the police and said that a man by the name of Rob drove the car in which the gas station killer left the scene and that Rob was planning to leave town by bus. About noon, the same woman called again, gave her address and phone number, and said that a man named Rob had told a Maria and two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller stated that Louanne was Julie's mother and that the two women lived at 2406 Fillmore Northeast. The detective-in-charge who took the second phone call sent po-

lice officers to 2406 Fillmore to check out Louanne and Julie. When police arrived they determined that the dwelling was a duplex and that Louanne Bergstrom and her daughter Julie lived in the upper unit but were not home. Police spoke to Louanne's mother, Helen Niederhoffer, who lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs but was not then in the unit. She promised to call the police when Olson returned. At 2 p.m., a pickup order, or "probable cause arrest bulletin," was issued for Olson's arrest. The police were instructed to stay away from the duplex.

At approximately 2:45 p.m., Niederhoffer called police and said Olson had returned. The detective-in-charge instructed police officers to go to the house and surround it. He then telephoned Julie from headquarters and told her Rob should come out of the house. The detective heard a male voice say, "tell them I left." Julie stated that Rob had left, whereupon at 3 p.m. the detective ordered the police to enter the house. Without seeking permission and with weapons drawn, the police entered the upper unit and found respondent hiding in a closet. Less than an hour after his arrest, respondent made an inculpatory statement at police headquarters.

The Hennepin County trial court held a hearing and denied respondent's motion to suppress his statement. App. 3–13. The statement was admitted into evidence at Olson's trial, and he was convicted on one count of first-degree murder, three counts of armed robbery, and three counts of second-degree assault. On appeal, the Minnesota Supreme Court reversed. 436 N. W. 2d 92 (1989). The court ruled that respondent had a sufficient interest in the Bergstrom home to challenge the legality of his warrantless arrest there, that the arrest was illegal because there were no exigent circumstances to justify a warrantless entry,[1] and that respondent's

[1] Because the absence of a warrant made respondent's arrest illegal, the court did not review the trial court's determination that the police had

statement was tainted by that illegality and should have been suppressed.[2] Because the admission of the statement was not harmless beyond reasonable doubt, the court reversed Olson's conviction and remanded for a new trial.[3]

We granted the State's petition for certiorari, 493 U. S. 806 (1989), and now affirm.

II

It was held in *Payton* v. *New York*, 445 U. S. 573 (1980), that a suspect should not be arrested in his house without an arrest warrant, even though there is probable cause to arrest him. The purpose of the decision was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause. In this case, the court below held that Olson's warrantless arrest was illegal because he had a sufficient connection with the premises to be treated like a householder. The State challenges that conclusion.

Since the decision in *Katz* v. *United States*, 389 U. S. 347 (1967), it has been the law that "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978). A subjective expectation of privacy is legitimate if it is "'one that society

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probable cause for the arrest. 436 N. W. 2d, at 95. Hence, we judge the case on the assumption that there was probable cause.

[2] The State had not argued that, if the arrest was illegal, respondent's statement was nevertheless not tainted by the illegality. *Id.*, at 98. Likewise, at oral argument before this Court, counsel for the State expressly disavowed any claim that the statement was not a fruit of the arrest. Tr. of Oral Arg. 4–5. We will therefore not raise *sua sponte* the applicability of *New York* v. *Harris*, *ante*, p. 14, to the facts of this case.

[3] The court left for the trial court on remand respondent's claims that other evidence—statements by persons present at 2406 Fillmore at the time of the arrest and a statement by Ecker obtained after the police showed him respondent's statement—should also have been suppressed as fruit of the illegal arrest.

is prepared to recognize as "reasonable,"'" *id.*, at 143–144, n. 12, quoting *Katz*, *supra*, at 361 (Harlan, J., concurring).

The State argues that Olson's relationship to the premises does not satisfy the 12 factors which in its view determine whether a dwelling is a "home."[4] Aside from the fact that it is based on the mistaken premise that a place must be one's "home" in order for one to have a legitimate expectation of privacy there,[5] the State's proposed test is needlessly complex. We need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show

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[4] The 12 factors are:

(1) the visitor has some property rights in the dwelling;

(2) the visitor is related by blood or marriage to the owner or lessor of the dwelling;

(3) the visitor receives mail at the dwelling or has his name on the door;

(4) the visitor has a key to the dwelling;

(5) the visitor maintains a regular or continuous presence in the dwelling, especially sleeping there regularly;

(6) the visitor contributes to the upkeep of the dwelling, either monetarily or otherwise;

(7) the visitor has been present at the dwelling for a substantial length of time prior to the arrest;

(8) the visitor stores his clothes or other possessions in the dwelling;

(9) the visitor has been granted by the owner exclusive use of a particular area of the dwelling;

(10) the visitor has the right to exclude other persons from the dwelling;

(11) the visitor is allowed to remain in the dwelling when the owner is absent; and

(12) the visitor has taken precautions to develop and maintain his privacy in the dwelling. Brief for Petitioner 21.

[5] Of course, 2406 Fillmore need not be respondent's "home," temporary or otherwise, in order for him to enjoy a reasonable expectation of privacy there. "[T]he Fourth Amendment protects people, not places," *Katz* v. *United States*, 389 U. S. 347, 351 (1967), and provides sanctuary for citizens wherever they have a legitimate expectation of privacy. *Id.*, at 359. Mr. Katz could complain because he had such an expectation in a telephone booth, not because it was his "home" for Fourth Amendment purposes. Similarly, if Olson had a reasonable expectation of privacy as a one-night guest, his warrantless seizure was unreasonable whether or not the upper unit at 2406 Fillmore was his home.

that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.

As recognized by the Minnesota Supreme Court, the facts of this case are similar to those in *Jones* v. *United States*, 362 U. S. 257 (1960). In *Jones*, the defendant was arrested in a friend's apartment during the execution of a search warrant and sought to challenge the warrant as not supported by probable cause.

> "[Jones] testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which [Jones] had admitted himself on the day of the arrest. On cross-examination [Jones] testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it 'as a friend,' that he had slept there 'maybe a night,' and that at the time of the search Evans had been away in Philadelphia for about five days." *Id.*, at 259.[6]

The Court ruled that Jones could challenge the search of the apartment because he was "legitimately on [the] premises," *id.*, at 267. Although the "legitimately on [the] premises" standard was rejected in *Rakas* as too broad, 439 U. S., at 142–148, the *Rakas* Court explicitly reaffirmed the factual holding in *Jones:*

> "We do not question the conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful. . . .
>
> "We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own

[6] Olson, who had been staying at Ecker's home for several days before the robbery, spent the night of the robbery on the floor of the Bergstroms' home, with their permission. He had a change of clothes with him at the duplex.

> home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." 439 U. S., at 141–142.

Rakas thus recognized that, as an overnight guest, Jones was much more than just legitimately on the premises.

The distinctions relied on by the State between this case and *Jones* are not legally determinative. The State emphasizes that in this case Olson was never left alone in the duplex or given a key, whereas in *Jones* the owner of the apartment was away and Jones had a key with which he could come and go and admit and exclude others. These differences are crucial, it is argued, because in not disturbing the holding in *Jones*, the Court pointed out that while his host was away, Jones had complete dominion and control over the apartment and could exclude others from it. *Rakas*, 439 U. S., at 149. We do not understand *Rakas*, however, to hold that an overnight guest can never have a legitimate expectation of privacy except when his host is away and he has a key, or that only when those facts are present may an overnight guest assert the "unremarkable proposition," *id.*, at 142, that a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures.

To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth—"a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable," *Katz*, 389 U. S., at 361 (Harlan, J., concurring).

That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest. It is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises. The host may admit or exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest. On the other hand, few houseguests will invite others to visit them while they are guests without consulting their hosts; but the latter, who have the authority to exclude despite the wishes of the guest, will often be accommodating. The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household. If the untrammeled power to admit and exclude were essential to Fourth Amendment protection,

an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto.

Because respondent's expectation of privacy in the Bergstrom home was rooted in "understandings that are recognized and permitted by society," *Rakas*, *supra*, at 144, n. 12, it was legitimate, and respondent can claim the protection of the Fourth Amendment.

III

In *Payton* v. *New York*, the Court had no occasion to "consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search," 445 U. S., at 583. This case requires us to determine whether the Minnesota Supreme Court was correct in holding that there were no exigent circumstances that justified the warrantless entry into the house to make the arrest.

The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh* [v. *Wisconsin*], 466 U. S. 740 [(1984)], or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling." 436 N. W. 2d, at 97. The court also apparently thought that in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered. Applying this standard, the state court determined that exigent circumstances did not exist.

We are not inclined to disagree with this fact-specific application of the proper legal standard. The court pointed out

that although a grave crime was involved, respondent "was known not to be the murderer but thought to be the driver of the getaway car," *ibid.*, and that the police had already recovered the murder weapon, *ibid.* "The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday. . . . It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended." *Ibid.* We do not disturb the state court's judgment that these facts do not add up to exigent circumstances.

IV

We therefore affirm the judgment of the Minnesota Supreme Court.

It is so ordered.

CHIEF JUSTICE REHNQUIST and JUSTICE BLACKMUN dissent.

JUSTICE STEVENS, concurring.

While I join the Court's entire opinion, I add this caveat concerning the discussion in Part II of respondent's standing to challenge his arrest on federal constitutional grounds. If we had concluded that he did not have standing as a matter of federal law, the question that would then have been presented would be whether this Court simply should have dismissed the appeal. For we have no power to prevent state courts from allowing litigants to raise federal questions even though they would not have standing to do so in a federal court. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 970–971 (1984) (concurring opinion).

Questions of that kind buttress my opinion that the Court grants review in far too many cases in which state courts have protected the constitutional rights of their own citizens. Notwithstanding the Court's decision to enlarge its

own power to review state-court judgments, see *Michigan* v. *Long*, 463 U. S. 1032 (1983), I remain convinced that this power should be used sparingly. See generally *Delaware* v. *Van Arsdall*, 475 U. S. 673, 689–708 (1986) (dissenting opinion). Only in the most unusual case should the Court volunteer its opinion that a state court has imposed standards upon its own law enforcement officials that are too high.

JUSTICE KENNEDY, concurring.

I interpret the last two paragraphs of Part III as deference to a state court's application of the exigent circumstances test to the facts of this case, and not as an endorsement of that particular application of the standard. With that understanding, I join the opinion of the Court.

Syllabus

OSBORNE *v.* OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

No. 88–5986. Argued December 5, 1989—Decided April 18, 1990

After Ohio police found photographs in petitioner Osborne's home, each of which depicted a nude male adolescent posed in a sexually explicit position, he was convicted of violating a state statute prohibiting any person from possessing or viewing any material or performance showing a minor who is not his child or ward in a state of nudity, unless (a) the material or performance is presented for a bona fide purpose by or to a person having a proper interest therein, or (b) the possessor knows that the minor's parents or guardian has consented in writing to such photographing or use of the minor. An intermediate appellate court and the State Supreme Court affirmed the conviction. The latter court rejected Osborne's contention that the First Amendment prohibits the States from proscribing the private possession of child pornography. The court also found that the statute is not unconstitutionally overbroad, since, in light of its specific exceptions, it must be read as only applying to depictions of nudity involving a lewd exhibition or graphic focus on the minor's genitals, and since scienter is an essential element of the offense. In rejecting Osborne's contention that the trial court erred in not requiring the government to prove lewd exhibition and scienter as elements of his crime, the court emphasized that he had not objected to the jury instructions given at his trial and stated that the failures of proof did not amount to plain error.

Held:

1. Ohio may constitutionally proscribe the possession and viewing of child pornography. Even assuming that Osborne has a valid First Amendment interest in such activities, this case is distinct from *Stanley* v. *Georgia*, 394 U. S. 557, which struck down a Georgia law outlawing the private possession of obscene material on the ground that the State's justifications for the law—primarily, that obscenity would poison the minds of its viewers—were inadequate. In contrast, Ohio does not rely on a paternalistic interest in regulating Osborne's mind, but has enacted its law on the basis of its compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials. See *New York* v. *Ferber*, 458 U. S. 747, 756–758, 761–762. Moreover, Ohio's ban encourages possessors to destroy such materials, which permanently record the victim's abuse and thus

may haunt him for years to come, see *id.*, at 759, and which, available evidence suggests, may be used by pedophiles to seduce other children. Pp. 108–111.

2. Osborne's First Amendment overbreadth arguments are unpersuasive. Pp. 111–122.

(a) The Ohio statute is not unconstitutionally overbroad. Although, on its face, the statute purports to prohibit constitutionally protected depictions of nudity, it is doubtful that any overbreadth would be "substantial" under this Court's cases, in light of the statutory exemptions and "proper purposes" provisions. In any event, the statute, as construed by the Ohio Supreme Court, plainly survives overbreadth scrutiny. By limiting the statute's operation to nudity that constitutes lewd exhibition or focuses on genitals, that court avoided penalizing persons for viewing or possessing innocuous photographs of naked children and thereby rendered the "nudity" language permissible. See *Ferber*, *supra*, at 765. Moreover, the statute's failure, on its face, to provide a *mens rea* requirement is cured by the court's conclusion that the State must establish scienter under the Ohio default statute specifying that recklessness applies absent a statutory intent provision. Pp. 111–115.

(b) It was not impermissible for the State Supreme Court to rely on its narrowed construction of the statute when evaluating Osborne's overbreadth claim. A statute as construed may be applied to conduct occurring before the construction, provided such application affords fair warning to the defendant. See, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, n. 7. It is obvious from the face of the child pornography statute, and from its placement within the "Sexual Offenses" chapter of the Ohio Code, that Osborne had notice that his possession of the photographs at issue was proscribed. *Bouie* v. *City of Columbia*, 378 U. S. 347; *Rabe* v. *Washington*, 405 U. S. 313; and *Marks* v. *United States*, 430 U. S. 188, distinguished. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87—which stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written—does not conflict with the holding in this case. Nor does *Massachusetts* v. *Oakes*, 491 U. S. 576—in which five Justices agreed in a separate opinion that a state legislature could not cure a potential overbreadth problem through a postconviction statutory amendment—support Osborne's view that an overbroad statute is void as written, such that a court may not narrow it, affirm a conviction on the basis of the narrowing construction, and leave the statute in full force. Since courts routinely adopt the latter course, acceptance of Osborne's proposition would require a radical reworking of American law.

Moreover, the *Oakes* approach is based on the fear that legislators who know they can cure their own mistakes by amendment without significant cost may not be careful to avoid drafting overbroad laws in the first place. A similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the Court, since legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth, and since applying even a narrowed statute to pending cases might be barred by the Due Process Clause. Furthermore, requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the overbreadth doctrine in a way that would not serve First Amendment interests. Pp. 115–122.

3. Nevertheless, due process requires that Osborne's conviction be reversed and the case remanded for a new trial, since it is unclear whether the conviction was based on a finding that the State had proved each of the elements of the offense. It is true that this Court is precluded from reaching the due process challenge with respect to the scienter element of the crime because counsel's failure to comply with the state procedural rule requiring an objection to faulty jury instructions constitutes an independent state-law ground adequate to support the result below. However, this Court is not so barred with respect to counsel's failure to object to the failure to instruct on lewdness, since, shortly before the brief trial, counsel moved to dismiss on the ground that the statute was overbroad in its failure to allow the viewing of innocent nude photographs. Nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions. The assertion of federal rights, when plainly and reasonably made, may not be defeated under the name of local practice. Cf. *Douglas* v. *Alabama*, 380 U. S. 415, 421–422. Pp. 122–125.

37 Ohio St. 3d 249, 525 N. E. 2d 1363, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 126. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 126.

S. Adele Shank argued the cause for appellant. With her on the briefs were *Randall M. Dana*, *John Quigley*, and *David Goldberger*.

Ronald J. O'Brien argued the cause and filed a brief for appellee.*

JUSTICE WHITE delivered the opinion of the Court.

In order to combat child pornography, Ohio enacted Rev. Code Ann. § 2907.323(A)(3) (Supp. 1989), which provides in pertinent part:

"(A) No person shall do any of the following:

. . . . . .

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photograph-

*Briefs of *amici curiae* urging affirmance were filed for the Attorneys General for the State of Arizona et al. by *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Andrew I. Sutter*, Assistant Attorney General, and *Loren L. Braverman*, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Robert A. Butterworth* of Florida, *James T. Jones* of Idaho, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *James M. Shannon* of Massachusetts, *Frank J. Kelley* of Michigan, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *Roger A. Tellinghuisen* of South Dakota, and *Kenneth O. Eikenberry* of Washington; for the American Family Association, Inc., by Peggy M. Coleman; for the Children's Legal Foundation by *Alan E. Sears;* for Concerned Women for America et al. by *H. Robert Showers*, *Wendell R. Bird*, *Jordan W. Lorence*, and *Cimron Campbell;* and for Covenant House et al. by *Gregory A. Loken* and *Judith Drazen Schretter*.

> ing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio, police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicts a nude male adolescent posed in a sexually explicit position.[1]

The Ohio Supreme Court affirmed Osborne's conviction, after an intermediate appellate court did the same. *State* v. *Young*, 37 Ohio St. 3d 249, 525 N. E. 2d 1363 (1988). Relying on one of its earlier decisions, the court first rejected Osborne's contention that the First Amendment prohibits the States from proscribing the private possession of child pornography.

Next, the court found that § 2907.323(A)(3) is not unconstitutionally overbroad. In so doing, the court, relying on the statutory exceptions, read § 2907.323(A)(3) as only applying to depictions of nudity involving a lewd exhibition or graphic focus on a minor's genitals. The court also found that scienter is an essential element of a § 2907.323(A)(3) offense. Osborne objected that the trial judge had not insisted that the government prove lewd exhibition and scienter as elements of his crime. The Ohio Supreme Court rejected these contentions because Osborne had failed to object to the

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[1] Osborne contends that the subject in all of the pictures is the same boy; Osborne testified at trial that he was told that the youth was 14 at the time that the photographs were taken. App. 16. The government maintains that three of the pictures are of one boy and one of the pictures is of another. Three photographs depict the same boy in different positions: sitting with his legs over his head and his anus exposed; lying down with an erect penis and with an electrical object in his hand; and lying down with a plastic object which appears to be inserted in his anus. The fourth photograph depicts a nude standing boy; it is unclear whether this subject is the same boy photographed in the other pictures because the photograph only depicts the boy's torso.

jury instructions given at his trial and the court did not believe that the failures of proof amounted to plain error.[2]

The Ohio Supreme Court denied a motion for rehearing, and granted a stay pending appeal to this Court. We noted probable jurisdiction last June. 492 U. S. 904.

I

The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), compels the contrary result. In *Stanley*, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate. *Id.*, at 564–568.[3]

Stanley should not be read too broadly. We have previously noted that *Stanley* was a narrow holding, see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 127 (1973), and, since the decision in that case, the value of permitting child pornography has been characterized as "exceedingly modest, if not *de minimis*." *New York* v. *Ferber*, 458 U. S. 747, 762 (1982). But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. Every court to address the issue has so concluded. See, *e. g.*, *People* v. *Geever*, 122 Ill. 2d 313, 327–328, 522 N. E. 2d 1200, 1206–1207 (1988);

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[2] Osborne also unsuccessfully raised a number of other challenges that are not at issue before this Court.

[3] We have since indicated that our decision in *Stanley* was "firmly grounded in the First Amendment." *Bowers* v. *Hardwick*, 478 U. S. 186, 195 (1986).

Felton v. *State*, 526 So. 2d 635, 637 (Ala. Ct. Crim. App.), aff'd *sub nom. Ex parte Felton*, 526 So. 2d 638, 641 (Ala. 1988); *State* v. *Davis*, 53 Wash. App. 502, 505, 768 P. 2d 499, 501 (1989); *Savery* v. *State*, 767 S. W. 2d 242, 245 (Tex. App. 1989); *United States* v. *Boffardi*, 684 F. Supp. 1263, 1267 (SDNY 1988).

In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. 394 U. S., at 565.[4] We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.*, at 566. The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." *Ferber*, 458 U. S., at 756–758 (citations omitted). It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the prod-

[4] Georgia also argued that its ban on possession was a necessary complement to its ban on distribution (see discussion *infra*, at 110) and that the possession law benefited the public because, according to the State, exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence. 394 U. S., at 566. We found a lack of empirical evidence supporting the latter claim and stated that "'[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .'" *Id.*, at 566–567 (citation omitted).

uct, thereby decreasing demand. In *Ferber*, where we upheld a New York statute outlawing the distribution of child pornography, we found a similar argument persuasive: "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Id.*, at 761–762, quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).

Osborne contends that the State should use other measures, besides penalizing possession, to dry up the child pornography market. Osborne points out that in *Stanley* we rejected Georgia's argument that its prohibition on obscenity possession was a necessary incident to its proscription on obscenity distribution. 394 U. S., at 567–568. This holding, however, must be viewed in light of the weak interests asserted by the State in that case. *Stanley* itself emphasized that we did not "mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials . . . . In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials." *Id.*, at 568, n. 11.[5]

Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States

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[5] As the dissent notes, see *post*, at 141, n. 16, the *Stanley* Court cited illicit possession of defense information as an example of the type of offense for which compelling state interests might justify a ban on possession. *Stanley*, however, did not suggest that this crime exhausted the entire category of proscribable offenses.

have found it necessary to proscribe the possession of this material.[6]

Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. 458 U. S., at 759. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.[7]

Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.

II

Osborne next argues that even if the State may constitutionally ban the possession of child pornography, his convic-

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[6] Ala. Code § 13A–12–192 (1988); Ariz. Rev. Stat. Ann. § 13–3553 (1989); Colo. Rev. Stat. § 18–6–403 (Supp. 1989); Fla. Stat. § 827.071 (1989); Ga. Code Ann. § 16–12–100 (1989); Idaho Code § 18–1507 (1987); Ill. Rev. Stat., ch. 38, ¶ 11–20–.1 (1987); Kans. Stat. Ann. § 21–3516 (Supp. 1989); Minn. Stat. § 617.247 (1988); Mo. Rev. Stat. § 573.037 (Supp. 1989); Neb. Rev. Stat. § 28–809 (1989); Nev. Rev. Stat. § 200.730 (1987); Ohio Rev. Code Ann. §§ 2907.322 and 2907.323 (Supp. 1989); Okla. Stat., Tit. 21, § 1021.2 (Supp. 1989); S. D. Codified Laws Ann. §§ 22–22–23, 22–22–23.1 (1988); Tex. Penal Code Ann. § 43.26 (1989 and Supp. 1989–1990); Utah Code Ann. § 76–5a–3(1)(a) (Supp. 1989); Wash. Rev. Code § 9.68A.070 (1989); W. Va. Code § 61–8C–3 (1989).

[7] The Attorney General's Commission on Pornography, for example, states: "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (footnotes omitted). See also, D. Campagna and D. Poffenberger, Sexual Trafficking in Children 118 (1988); S. O'Brien, Child Pornography 89 (1983).

tion is invalid because §2907.323(A)(3) is unconstitutionally overbroad in that it criminalizes an intolerable range of constitutionally protected conduct.[8] In our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973). Even where a statute at its margins infringes on protected expression, "facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" *New York* v. *Ferber*, 458 U. S., at 770, n. 25.

The Ohio statute, on its face, purports to prohibit the possession of "nude" photographs of minors. We have stated that depictions of nudity, without more, constitute protected expression. See *Ferber*, *supra*, at 765, n. 18. Relying on this observation, Osborne argues that the statute as written is substantially overbroad. We are skeptical of this claim because, in light of the statute's exemptions and "proper purposes" provisions, the statute may not be substantially overbroad under our cases.[9] However that may be, Os-

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[8] In the First Amendment context, we permit defendants to challenge statutes on overbreadth grounds, regardless of whether the individual defendant's conduct is constitutionally protected. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts* v. *Oakes*, 491 U. S. 576, 581 (1989).

[9] The statute applies only where an individual possesses or views the depiction of a minor "who is not the person's child or ward." The State, moreover, does not impose criminal liability if either "[t]he material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other

borne's overbreadth challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survives overbreadth scrutiny. Under the Ohio Supreme Court reading, the statute prohibits "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." 37 Ohio St. 3d, at 252, 525 N. E. 2d, at 1368.[10] By limiting the statute's operation in

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proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance," or "[t]he person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." It is true that, despite the statutory exceptions, one might imagine circumstances in which the statute, by its terms, criminalizes constitutionally protected conduct. If, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply. But, given the broad statutory exceptions and the prevalence of child pornography, it is far from clear that the instances where the statute applies to constitutionally protected conduct are significant enough to warrant a finding that the statute is overbroad. Cf. *Oakes*, *supra*, at 589–590 (opinion of SCALIA, J., joined by BLACKMUN, J., concurring in judgment in part and dissenting in part).

Nor do we find very persuasive Osborne's contention that the statute is unconstitutionally overbroad because it applies in instances where viewers or possessors lack scienter. Although § 2907.323(A)(3) does not specify a mental state, Ohio law provides that recklessness is the appropriate *mens rea* where a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability." Ohio Rev. Stat. Ann. § 2901.21(B) (1987).

We also do not find any merit to Osborne's claim that § 2907.323(A)(3) is unconstitutionally vague because it does not define the term "minor." Under Ohio law, a minor is anyone under 18 years of age. Ohio Rev. Code Ann. § 3109.01 (1989).

[10] The Ohio court reached this conclusion because "when the 'proper purposes' exceptions set forth in R. C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear

this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children. We have upheld similar language against overbreadth challenges in the past. In *Ferber*, we affirmed a conviction under a New York statute that made it a crime to promote the "'lewd exhibition of [a child's] genitals.'" 458 U. S., at 751. We noted that "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* [v. *California*, 413 U. S. 15 (1973),] as an example of a permissible regulation." *Id.*, at 765.[11]

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purpose of these exceptions . . . is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i. e., the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." 37 Ohio St. 3d, at 251–252, 525 N. E. 2d, at 1367–1368 (emphasis in original).

[11] The statute upheld against an overbreadth challenge in *Ferber* was, moreover, arguably less narrowly tailored than the statute challenged in this case because, unlike § 2907.323(A)(3), the New York law did not provide a broad range of exceptions to the general prohibition on lewd exhibition of the genitals. Despite this lack of exceptions, we upheld the New York law, reasoning that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." 458 U. S., at 773.

The dissent distinguishes the Ohio statute, as construed, from the statute upheld in *Ferber* on the ground that the Ohio statute proscribes "'lewd exhibitions of *nudity*' rather than 'lewd exhibitions of *the genitals*.'" See *post*, at 129 (emphasis in original). The dissent notes that Ohio defines nudity to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state." *Post*, at 130. We do not agree that this distinction between body areas and specific body parts is constitutionally significant: The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks. In any event, however, Osborne would not be entitled to

The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of § 2907.323 (A)(3) based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent specification. See n. 9, *supra*. The statute on its face lacks a *mens rea* requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter. 458 U. S., at 765.

Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him—*i. e.*, to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t]." *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, n. 7 (1965) (citations omitted).[12] In *Hamling* v. *United States*,

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relief. The context of the opinion indicates that the Ohio Supreme Court believed that "the term 'nudity' as used in R. C. 2907.323(A)(3) refers to a lewd exhibition of the genitals." *State* v. *Young*, 37 Ohio St. 3d 249, 258, 525 N. E. 2d 1363, 1373 (1988).

We do not concede, as the dissent suggests, see *post*, at 131, n. 5, that the statute as construed might proscribe a family friend's possession of an innocuous picture of an unclothed infant. We acknowledge (see n. 9, *supra*) that the statute as written might reach such conduct, but as construed the statute would surely not apply because the photograph would not involve a "lewd exhibition or graphic focus on the genitals" of the child.

[12] This principle, of course, accords with the rationale underlying overbreadth challenges. We normally do not allow a defendant to challenge a law as it is applied to others. In the First Amendment context, however, we have said that "[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski*, 380 U. S., at 486. But once a statute is authoritatively construed, there is no longer any danger that pro-

418 U. S. 87 (1974), for example, we reviewed the petitioners' convictions for mailing and conspiring to mail an obscene advertising brochure under 18 U. S. C. § 1461. That statute makes it a crime to mail an "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." In *Hamling*, for the first time, we construed the term "obscenity" as used in § 1461 "to be limited to the sort of 'patently offensive representations or depictions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.'" In light of this construction, we rejected the petitioners' facial challenge to the statute as written, and we affirmed the petitioners' convictions under the section after finding that the petitioners had fair notice that their conduct was criminal. 418 U. S., at 114–116.

Like the *Hamling* petitioners, Osborne had notice that his conduct was proscribed. It is obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography. The provision criminalizes the viewing and possessing of material depicting children in a state of nudity for other than "proper purposes." The provision appears in the "Sex Offenses" chapter of the Ohio Code. Section 2907.323 is preceded by § 2907.322, which proscribes "[p]andering sexually oriented matter involving a minor," and followed by § 2907.33, which proscribes "[d]eception to obtain matter harmful to juveniles." That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration. Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn that his possession of the four photographs at issue in this case constituted a crime.

Because Osborne had notice that his conduct was criminal, his case differs from three cases upon which he relies: *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), *Rabe* v. *Washing-*

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tected speech will be deterred and therefore no longer any reason to entertain the defendant's challenge to the statute on its face.

ton, 405 U. S. 313 (1972), and *Marks* v. *United States*, 430 U. S. 188 (1977). In *Bouie*, the petitioners had refused to leave a restaurant after being asked to do so by the restaurant's manager. Although the manager had not objected when the petitioners entered the restaurant, the petitioners were convicted of violating a South Carolina trespass statute proscribing "'entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry.'" 378 U. S., at 349. Affirming the convictions, the South Carolina Supreme Court construed the trespass law as also making it a crime for an individual to remain on another's land after being asked to leave. We reversed the convictions on due process grounds because the South Carolina Supreme Court's expansion of the statute was unforseeable and therefore the petitioners had no reason to suspect that their conduct was criminal. *Id.*, at 350–352.

Likewise, in *Rabe* v. *Washington*, *supra*, the petitioner had been convicted of violating a Washington obscenity statute that, by its terms, did not proscribe the defendant's conduct. On the petitioner's appeal, the Washington Supreme Court nevertheless affirmed the petitioner's conviction, after construing the Washington obscenity statute to reach the petitioner. We overturned the conviction because the Washington Supreme Court's broadening of the statute was unexpected; therefore the petitioner had no warning that his actions were proscribed. *Id.*, at 315.

And, in *Marks* v. *United States*, *supra*, we held that the retroactive application of the obscenity standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), to the potential detriment of the defendant violated the Due Process Clause because, at the time that the defendant committed the challenged conduct, our decision in *Memoirs* v. *Attorney General of Massachusetts*, 383 U. S. 413 (1966), provided the governing law. The defendant could not suspect that his actions would later become criminal when we expanded the range of constitutionally proscribable conduct in *Miller*.

Osborne suggests that our decision here is inconsistent with *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965). We disagree. In *Shuttlesworth*, the defendant had been convicted of violating an Alabama ordinance that, when read literally, provided that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.*, at 90. We stated that "[t]he constitutional vice of so broad a provision needs no demonstration." *Ibid.* As subsequently construed by the Alabama Supreme Court, however, the ordinance merely made it criminal for an individual who was blocking free passage along a public street to disobey a police officer's order to move. We noted that "[i]t is our duty, of course, to accept this state judicial construction of the ordinance. . . . As so construed, we cannot say that the ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied." *Id.*, at 91. We nevertheless reversed the defendant's conviction because it was not clear that the State had convicted the defendant under the ordinance as construed rather than as written. *Id.*, at 91–92.[13] *Shuttlesworth*, then, stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written; this proposition in no way conflicts with our holding in this case.

Finally, despite Osborne's contention to the contrary, we do not believe that *Massachusetts* v. *Oakes*, 491 U. S. 576 (1989), supports his theory of this case. In *Oakes*, the petitioner challenged a Massachusetts pornography statute as

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[13] In *Shuttlesworth*, we also overturned the defendant's conviction for violating another part of the same Alabama ordinance because that provision had been interpreted as criminalizing an individual's failure to follow a policeman's directions when the policeman was directing traffic, and the crime alleged in *Shuttlesworth* had nothing to do with motor traffic. 382 U. S., at 93–95.

overbroad; since the time of the defendant's alleged crime, however, the State had substantially narrowed the statute through a subsequent legislative enactment—an amendment to the statute. In a separate opinion, five Justices agreed that the state legislature could not cure the potential overbreadth problem through the subsequent legislative action; the statute was void as written. *Id.*, at 585–586.

Osborne contends that *Oakes* stands for a similar but distinct proposition that, when faced with a potentially overinclusive statute, a court may not construe the statute to avoid overbreadth problems and then apply the statute, as construed, to past conduct. The implication of this argument is that if a statute is overbroad as written, then the statute is void and incurable. As a result, when reviewing a conviction under a potentially overbroad statute, a court must either affirm or strike down the statute on its face, but the court may not, as the Ohio Supreme Court did in this case, narrow the statute, affirm on the basis of the narrowing construction, and leave the statute in full force. We disagree.

First, as indicated by our earlier discussion, if we accepted this proposition, it would require a radical reworking of our law. Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach, apply the statute in that case, and leave the statute in place. In *Roth* v. *United States*, 354 U. S. 476 (1957), for example, the Court construed the open-ended terms used in 18 U. S. C. § 1461, which prohibits the mailing of material that is "obscene, lewd, lascivious, indecent, filthy or vile." Justice Harlan characterized *Roth* in this way:

> "The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the

> statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of *United States* v. *Bennet*, 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth* v. *United States*, *supra*, at 489, 'taken as a whole appeals to prurient interest.'" *Manuel Enterprises, Inc.* v. *Day*, 370 U. S. 478, 482–484 (1962) (footnotes omitted; emphasis in original).

See also, *Hamling*, 418 U. S., at 112 (quoting the above). The petitioner's conviction was affirmed in *Roth*, and federal obscenity law was left in force. 354 U. S., at 494.[14] We, moreover, have long respected the State Supreme Courts' ability to narrow state statutes so as to limit the statute's scope to unprotected conduct. See, *e. g.*, *Ginsberg* v. *New York*, 390 U. S. 629 (1968).

Second, we do not believe that *Oakes* compels the proposition that Osborne urges us to accept. In *Oakes*, JUSTICE SCALIA, writing for himself and four others, reasoned:

> "The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free . . . that is, if *no* conviction of constitutionally proscribable conduct would be

[14] *Buckley* v. *Valeo*, 424 U. S. 1, 76–80 (1976), is another landmark case where a law was construed to avoid potential overbreadth problems and left in place. Section 304(e) of the Federal Election Campaign Act, 2 U. S. C. § 434(e) (1976 ed.), imposed certain reporting requirements on "[e]very person . . . who makes contributions or independent expenditures" exceeding $100 "other than by contribution to a political committee or candidate." We stated that "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." The section was upheld as construed. 424 U. S., at 80 (footnote omitted).

> lost, so long as the offending statute was narrowed before the final appeal . . . then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled' . . . ." 491 U. S., at 586 (emphasis in original).

In other words, five of the *Oakes* Justices feared that if we allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), we would decrease the legislature's incentive to draft a narrowly tailored law in the first place.

Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. But a similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the court. This is so primarily because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth. In the latter event, there could be no convictions under that law even of those whose own conduct is unprotected by the First Amendment. Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause. Thus, careless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth by statutory construction.

There are also other considerations. Osborne contends that when courts construe statutes so as to eliminate overbreadth, convictions of those found guilty of unprotected conduct covered by the statute must be reversed and any fur-

ther convictions for prior reprehensible conduct are barred.[15] Furthermore, because he contends that overbroad laws implicating First Amendment interests are nullities and incapable of valid application from the outset, this would mean that judicial construction could not save the statute even as applied to subsequent conduct unprotected by the First Amendment. The overbreadth doctrine, as we have recognized, is indeed "strong medicine," *Broadrick* v. *Oklahoma*, 413 U. S., at 613, and requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the doctrine in a way that would not serve First Amendment interests.[16]

III

Having rejected Osborne's *Stanley* and overbreadth arguments, we now reach Osborne's final objection to his conviction: his contention that he was denied due process because it is unclear that his conviction was based on a finding that each of the elements of § 2907.323(A)(3) was present.[17] According

[15] Under Osborne's submission, even where the construction eliminating overbreadth occurs in a civil case, the statute could not be applied to conduct occurring prior to the decision; for although plainly within reach of the terms of the statute and plainly not otherwise protected by the First Amendment, until the statute was narrowed to comply with the Amendment, the conduct was not illegal.

[16] In terms of applying a ruling to pending cases, we see no difference of constitutional import between a court affirming a conviction after construing a statute to avoid facial invalidation on the ground of overbreadth, and affirming a conviction after rejecting a claim that the conduct at issue is not within the terms of the statute. In both situations, the Due Process Clause would require fair warning to the defendant that the statutory proscription, as construed, covers his conduct. But even with the due process limitation, courts repeatedly affirm convictions after rejecting nonfrivolous claims that the conduct at issue is not forbidden by the terms of the statute. As argued earlier, there is no doubt whatsoever that Osborne's conduct is proscribed by the terms of the child pornography statute involved here.

[17] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to con-

to the Ohio Supreme Court, in order to secure a conviction under § 2907.323(A)(3), the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals. The jury in this case was not instructed that it could convict Osborne only for conduct that satisfied these requirements.

The State concedes the omissions in the jury instructions, but argues that Osborne waived his right to assert this due process challenge because he failed to object when the instructions were given at his trial. The Ohio Supreme Court so held, citing Ohio law. The question before us now, therefore, is whether we are precluded from reaching Osborne's due process challenge because counsel's failure to comply with the procedural rule constitutes an independent state-law ground adequate to support the result below. We have no difficulty agreeing with the State that Osborne's counsel's failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state-law ground preventing us from reaching Osborne's due process contention on that point. Ohio law states that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state. See n. 9, *supra*. The state procedural rule, moreover, serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.

With respect to the trial court's failure to instruct on lewdness, however, we reach a different conclusion: Based upon our review of the record, we believe that counsel's failure to object on this point does not prevent us from considering Osborne's constitutional claim. Osborne's trial was brief: The State called only the two arresting officers to the stand; the defense summoned only Osborne himself. Right before trial, Osborne's counsel moved to dismiss the case, contending

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stitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970).

that § 2907.323(A)(3) is unconstitutionally overbroad. Counsel stated:

> "I'm filing a motion to dismiss based on the fact that [the] statute is void for vagueness, overbroad . . . The statute's overbroad because . . . a person couldn't have pictures of his own grandchildren; probably couldn't even have nude photographs of himself.
>
> "Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law . . . .
>
> . . . . .
>
> "So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute. And on that basis I'm going to ask the Court to dismiss the case." Tr. 3–4.

The prosecutor informed the trial judge that a number of Ohio state courts had recently rejected identical motions challenging § 2907.323(A)(3). Tr. 5–6. The court then overruled the motion. *Id.*, at 7. Immediately thereafter, Osborne's counsel proposed various jury instructions. *Ibid.*

Given this sequence of events, we believe that we may reach Osborne's due process claim because we are convinced that Osborne's attorney pressed the issue of the State's failure of proof on lewdness before the trial court and, under the circumstances, nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions. The trial judge, in no uncertain terms, rejected counsel's argument that the statute as written was overbroad. The State contends that counsel should then have insisted that the court instruct the jury on lewdness because, absent a finding that this element existed, a conviction would be unconstitutional. Were we to accept this position, we would "'force resort to an arid ritual of meaningless form,' . . . and would further no perceivable state interest." *James* v. *Kentucky*, 466 U. S. 341, 349 (1984), quoting *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), and citing *Henry*

v. *Mississippi*, 379 U. S. 443, 448–449 (1965). As Justice Holmes warned us years ago, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923).

Our decision here is analogous to our decision in *Douglas* v. *Alabama*, 380 U. S. 415 (1965). In that case, the Alabama Supreme Court had held that a defendant had waived his Confrontation Clause objection to the reading into evidence of a confession that he had given. Although not following the precise procedure required by Alabama law,[18] the defendant had unsuccessfully objected to the prosecution's use of the confession. We followed "our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question" and stated that "[i]n determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Id.*, at 422. Concluding that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection," we held that the Alabama procedural ruling did not preclude our consideration of the defendant's constitutional claim. *Id.*, at 421–422. We reach a similar conclusion in this case.

IV

To conclude, although we find Osborne's First Amendment arguments unpersuasive, we reverse his conviction and re-

[18] The Alabama court had stated: "'There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession.'" 380 U. S., at 421 (citation omitted).

mand for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements of § 2907.323(A)(3).

So ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I write separately only to express my agreement with JUSTICE BRENNAN, see *post*, at 146, n. 20, that this Court's ability to entertain Osborne's due process claim premised on the failure of the trial court to charge the "lewd exhibition" and "graphic focus" elements does not depend upon his objection to this failure at trial.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

I agree with the Court that appellant's conviction must be reversed. I do not agree, however, that Ohio is free on remand to retry him under Ohio Rev. Code Ann. §2907.323(A)(3) (Supp. 1989) as it currently exists. In my view, the state law, even as construed authoritatively by the Ohio Supreme Court, is still fatally overbroad, and our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), prevents the State from criminalizing appellant's possession of the photographs at issue in this case. I therefore respectfully dissent.

I

A

As written, the Ohio statute is plainly overbroad. Section 2907.323(A)(3) makes it a crime to "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." Another section defines "nudity" as

> "the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full opaque covering of any portion thereof

> below the top of the nipple, or of covered male genitals in a discernibly turgid state." § 2907.01(H).

In short, §§2907.323 and 2907.01(H) use simple nudity, without more, as a way of defining child pornography.[1] But as our prior decisions have made clear, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981) (quoting *Jenkins* v. *Georgia*, 418 U. S. 153, 161 (1974)); see also *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 224 (1990) (plurality opinion); *id.*, at 238, n. 1 (BRENNAN, J., concurring in judgment); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932–933 (1975); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558 (1975); *California* v. *LaRue*, 409 U. S. 109, 118 (1972). In *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 213 (1975), for example, we invalidated an ordinance that "would [have] bar[red] a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might [have] prohibit[ed] newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." The Ohio law as written has the same broad coverage and is similarly unconstitutional.[2]

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[1] Other provisions of Ohio law relating to child pornography are not phrased in terms of "nudity." For example, Ohio Rev. Code Ann. § 2907.321 (Supp. 1989) prohibits the knowing creation, sale, distribution, or possession of "obscenity involving a minor." Section 2907.322 prohibits the knowing creation, sale, distribution, or possession of materials depicting a minor engaging in "sexual activity" (defined as "sexual conduct or sexual contact," see §§ 2907.01(A), (B), (C)), masturbation, or bestiality. The documented harm from child pornography arises chiefly from the type of *obscene* materials that would be punished under these provisions, rather than from the depictions of mere "nudity" that are criminalized in § 2907.323. See *New York* v. *Ferber*, 458 U. S. 747, 779, n. 4 (1982) (STEVENS, J., concurring in judgment).

[2] The Court hints that § 2907.323's exemptions and "proper purposes" provisions might save it from being overbroad. See *ante*, at 112. I disagree. The enumerated "proper purposes" (*e. g.*, a "bona fide artistic, medical, scientific, educational . . . or other proper purpose") are simulta-

B

Wary of the statute's use of the "nudity" standard, the Ohio Supreme Court construed § 2907.323(A)(3) to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." *State* v. *Young*, 37 Ohio St. 3d 249, 252, 525 N. E. 2d 1363, 1368 (1988). The "lewd exhibition" and "graphic focus" tests not only fail to cure the overbreadth of the statute, but they also create a new problem of vagueness.

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The Court dismisses appellant's overbreadth contention in a single cursory paragraph. Relying exclusively on our previous decision in *New York* v. *Ferber*, 458 U. S. 747 (1982),[3]

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neously too vague and too narrow. What is an acceptable "artistic" purpose? Would erotic art along the lines of Robert Mapplethorpe's qualify? What is a valid "scientific" or "educational" purpose? What about sex manuals? See, *e. g.*, *Faloona* v. *Hustler Magazine, Inc.*, 607 F. Supp. 1341 (ND Tex. 1985), aff'd, 799 F. 2d 1000 (CA5 1986). What is a permissible "other proper purpose"? What about photos taken for one purpose and recirculated for other, more prurient purposes? The "proper purposes" standard appears to create problems analogous to those this Court has encountered in describing the "redeeming social importance" of obscenity. See *Pope* v. *Illinois*, 481 U. S. 497, 500–501 (1987); *id.*, at 513–519 (STEVENS, J., dissenting); *Smith* v. *United States*, 431 U. S. 291, 319–321 (1977) (STEVENS, J., dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 84–85 (1973) (BRENNAN, J., dissenting); *Miller* v. *California*, 413 U. S. 15, 24 (1973); *Memoirs* v. *Attorney General of Massachusetts*, 383 U. S. 413, 418 (1966) (plurality opinion); *Roth* v. *United States*, 354 U. S. 476, 484–485 (1957).

At the same time, however, Ohio's list of "proper purposes" is too limited; it excludes such obviously permissible uses as the commercial distribution of fashion photographs or the simple exchange of pictures among family and friends. Thus, a neighbor or grandparent who receives a photograph of an unclothed toddler might be subject to criminal sanctions.

[3] Although the phrase "lewd exhibition of the genitals" was offered as an example of a permissible regulation in *Miller* v. *California*, 413 U. S., at 25, it was mentioned in the Court's treatment of a *vagueness* question. Even then the phrase was prefaced with the words "[p]atently offensive

the majority reasons that the "lewd exhibition" standard adequately narrows the statute's ambit because "[w]e have upheld similar language against overbreadth challenges in the past." *Ante*, at 114. The Court's terse explanation is unsatisfactory, since *Ferber* involved a law that differs in crucial respects from the one here.

The New York law at issue in *Ferber* criminalized the use of a child in a "'*[s]exual performance*,'" defined as "'any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.'" 458 U. S., at 751 (quoting N. Y. Penal Law § 263.00(1) (McKinney 1980)). "'"*Sexual conduct*"'" was in turn defined as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'" 458 U. S., at 751 (quoting § 263.00 (3)). Although we acknowledged that "nudity, without more[,] is protected expression," *id.*, at 765, n. 18, we found that the statute was not overbroad because only "a tiny fraction of materials within the statute's reach" was constitutionally protected. *Id.*, at 773; see also *id.*, at 776 (BRENNAN, J., concurring in judgment). We therefore upheld the conviction of a bookstore proprietor who sold films depicting young boys masturbating.

The Ohio law is distinguishable for several reasons. First, the New York statute did not criminalize materials with a "*graphic focus*" on the genitals, and, as discussed further below, Ohio's "graphic focus" test is impermissibly capacious. Even setting aside the "graphic focus" element, the Ohio Supreme Court's narrowing construction is still overbroad because it focuses on "lewd exhibitions of *nudity*" rather than "lewd exhibitions of *the genitals*" in the context of *sexual conduct*, as in the New York statute at issue in *Ferber*.[4]

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representations or descriptions," *ibid.*, and included in a list with other types of sexual conduct that served to limit its scope.

[4] The Court maintains that "[t]he context of the opinion indicates that the Ohio Supreme Court believed that 'the term "nudity" as used in R. C.

Ohio law defines "nudity" to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state," *as well as* depictions of the genitals. On its face, then, the Ohio law is much broader than New York's.

In addition, whereas the Ohio Supreme Court's interpretation uses the "lewd exhibition of nudity" test standing alone, the New York law employed the phrase "'lewd exhibition of

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2907.323(A)(3) refers to a lewd exhibition of the genitals.' *State* v. *Young*, 37 Ohio St. 3d 249, 258, 525 N. E. 2d 1363, 1373 (1988)." *Ante*, at 115, n. 11. The passage cited (and quoted in part) by the Court, however, is a description of appellant's objections at trial and his argument on appeal, not a precise formulation by the Ohio Supreme Court of the "lewd exhibition" test. Indeed, only two sentences after the quotation cited by the majority, the Ohio court referred to "lewdness [a]s a necessary element of *nudity* under R. C. 2907.323(A)(3)." 37 Ohio St. 3d, at 258, 525 N. E. 2d, at 1373 (emphasis added). Earlier in its opinion, the Ohio Supreme Court more carefully articulated its construction of the statute and stated that § 2907.323(A)(3) criminalizes depictions of nudity "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." *Id.*, at 252, 525 N. E. 2d, at 1368. It is on this portion of the opinion that I rely.

The Ohio Supreme Court did not say, "[W]here such nudity constitutes a lewd exhibition *of* or involves a graphic focus on the genitals." The noun "exhibition" does not take as a modifier the preposition "on," and the court's repeated reference to the "prohibited state of nudity" as "a lewd exhibition or a graphic focus on the genitals," *id.*, at 251, 525 N. E. 2d, at 1367, leaves no doubt that its choice of words was deliberate. The Ohio court clearly meant the "lewd exhibition" standard to pertain only to nudity and not to displays of the genitals. See also *ibid.* (referring to "morally innocent states of nudity as well as lewd exhibitions").

But were the Court today correct that the Ohio Supreme Court intended to create a "'lewd exhibition' of the genitals" test, I would hardly be reassured. Indeed, such a confused approach by the Ohio Supreme Court, referring in one part of its opinion to "lewd exhibitions of *nudity*" and in another to "lewd exhibitions of *the genitals*," would create a great deal of uncertainty regarding the scope of § 2907.323(A)(3) and likely would render that statute void for vagueness. We, of course, are powerless to clarify or elaborate on the interpretation of Ohio law provided by the state court. See *Freedman* v. *Maryland*, 380 U. S. 51, 60–61 (1965).

the genitals'" in the context of a longer list of examples of sexual conduct: "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, [and] sado-masochistic abuse.'" 458 U. S., at 751. This syntax was important to our decision in *Ferber*. We recognized the potential for impermissible applications of the New York statute, see *id.*, at 773, but in view of the examples of "sexual conduct" provided by the statute, we were willing to assume that the New York courts would not "widen the *possibly invalid* reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" *Ibid.* (emphasis added). In the Ohio statute, of course, there is no analog to the elaborate definition of "sexual conduct" to serve as a similar limit. Hence, while the New York law could be saved at least in part by the notion of *ejusdem generis*, see 2A C. Sands, Sutherland on Statutory Construction § 47.17, p. 166 (4th ed. 1984), the Ohio Supreme Court's construction of its law cannot.

Indeed, the broad definition of nudity in the Ohio statutory scheme means that "child pornography" could include any photograph depicting a "lewd exhibition" of even a small portion of a minor's buttocks or any part of the female breast below the nipple. Pictures of topless bathers at a Mediterranean beach, of teenagers in revealing dresses, and even of toddlers romping unclothed, all might be prohibited.[5] Fur-

[5] The majority concedes that "[i]f, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply." *Ante*, at 113, n. 9. To provide another disturbing illustration: A well-known commercial advertisement for a suntan lotion shows a dog pulling down the bottom half of a young girl's bikini, revealing a stark contrast between her suntanned back and pale buttocks. That this advertisement might be illegal in Ohio is an absurd, yet altogether too conceivable, conclusion under the language of the statute. "Many of the world's great artists—Degas, Renoir, Donatello, to name a few—have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors." *Massachusetts* v. *Oakes*, 491 U. S. 576, 593 (1989) (BRENNAN, J., dissenting) (foot-

thermore, the Ohio law forbids not only depictions of nudity *per se*, but also depictions of the buttocks, breast, or pubic area with less than a "full, opaque covering." Thus, pictures of fashion models wearing semitransparent clothing might be illegal,[6] as might a photograph depicting a fully clad male that nevertheless captured his genitals "in a discernibly turgid state." The Ohio statute thus sweeps in many types of materials that are not "child pornography," as we used that term in *Ferber*, but rather that enjoy full First Amendment protection.

It might be objected that many of these depictions of nudity do not amount to "lewd exhibitions." But in the absence of *any* authoritative definition of that phrase by the Ohio Supreme Court, we cannot predict which ones. Many would characterize a photograph of a seductive fashion model or alluringly posed adolescent on a topless European beach as "lewd," although such pictures indisputably enjoy constitutional protection. Indeed, some might think that *any* nudity, especially that involving a minor, is by definition "lewd," yet this Court has clearly established that nudity is not ex-

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note omitted). In addition, there is an "abundance of baby and child photographs taken every day without full frontal covering, not to mention the work of artists and filmmakers and nudist family snapshots." *Id.*, at 598 (BRENNAN, J., dissenting); see also *State* v. *Schmakel*, No. L–88–300, (Ohio Ct. App., Oct. 13, 1989), pp. 10–11 ("[A] parent photographing his naked toddler on a bear rug would be threatened with a prison term . . . even though parents ostensibly have the same interests in taking those pictures as they do in keeping a journal or gloating about their children's accomplishments"). None of these examples involves "sexual conduct," *Ferber*, 458 U. S., at 765, yet all might be unlawful under the Ohio statute.

[6] Cf. *Steffens* v. *State*, 343 So. 2d 90, 91 (Fla. App. 1977) (invalidating as impermissibly vague ordinance that prohibited "female waitresses, entertainers or other employees of a public business" from appearing with their breasts "thinly covered by mesh, transparent net or lawn skin tight materials which are flesh colored and worn skin tight, so as to appear uncovered," on the ground that "[i]n view of the scanty female apparel which is now socially acceptable in public particularly on beaches, the description of the type of clothing forbidden by this ordinance is extremely unclear").

cluded automatically from the scope of the First Amendment. The Court today is unable even to hazard a guess as to what a "lewd exhibition" might mean; it is forced to rely entirely on an inapposite case—*Ferber*—that simply did not discuss, let alone decide, the central issue here.

The Ohio Supreme Court provided few clues as to the meaning of the phrase "lewd exhibition of nudity." The court distinguished "child pornography" from "obscenity," see 37 Ohio St. 3d, at 257, 525 N. E. 2d, at 1372, thereby implying that it did not believe that an exhibition was required to be "obscene" in order to qualify as "lewd."[7] But it supplied no authoritative definition—a disturbing omission in light of the absence of the phrase "lewd exhibition" from the statutory definition section of the Sex Offenses chapter of the Ohio Revised Code. See § 2907.01.[8] In fact, the word

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[7] Other courts have found it necessary to equate "lewd" with "obscene" in order to avoid overbreadth and vagueness problems. See, *e. g.*, *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130, n. 7 (1973); *Donnenberg* v. *State*, 1 Md. App. 591, 597, 232 A. 2d 264, 267 (1967) ("lewd" and "indecent" equivalent to "obscene"; "[o]therwise the words would be too vague to constitute a permissible standard in a criminal statute"); *State ex rel. Cahalan* v. *Diversified Theatrical Corp.*, 59 Mich. App. 223, 232–233, 229 N. W. 2d 389, 393 (1975); *Seattle* v. *Marshall*, 83 Wash. 2d 665, 672, 521 P. 2d 693, 697 (1974); *State* v. *Voshart*, 39 Wis. 2d 419, 429–431, 159 N. W. 2d 1, 6–7 (1968). But the Ohio Supreme Court specifically rejected this path.

In my judgment, even equating "lewd" with "obscene" would not adequately clarify matters because "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 103 (BRENNAN, J., dissenting); see also *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 133–134 (1989) (BRENNAN, J., concurring in part and dissenting in part); *Pope* v. *Illinois*, 481 U. S. 497, 507 (1987) (BRENNAN, J., dissenting); *id.*, at 513–518 (STEVENS, J., dissenting).

[8] Revised Code § 2905.26(B), which was repealed in 1974, defined "lewdness" somewhat unhelpfully as "any indecent or obscene act." As it now

"lewd" does *not* appear in the statutory definition of *any* crime involving obscenity or other sexually oriented materials in the Ohio Revised Code. See §§ 2907.31–2907.35.

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reads, the Sex Offenses chapter of the Ohio Revised Code is remarkably *devoid* of any use of the term "lewd." The crime of "importuning," for example, is defined as the solicitation to engage in "sexual activity" or "sexual conduct." Ohio Rev. Code Ann. § 2907.07 (1975). "Public indecency" comprises "expos[ing one's] private parts," "engag[ing] in masturbation," "engag[ing] in sexual conduct," or "engag[ing] in conduct which to an ordinary observer would appear to be sexual conduct or masturbation." § 2907.09. "Prostitution" is described as engaging in "sexual activity for hire." Ohio Rev. Code Ann. §§ 2907.21–2907.26 (1975 and Supp. 1989).

Currently, several sections of the Ohio Revised Code outside the Sex Offenses chapter contain the term "lewd." See Ohio Rev. Code Ann. § 715.52 (1976) ("Any municipal corporation may . . . [p]rovide for the punishment of all lewd and lascivious behavior in the streets and other public places"); Ohio Rev. Code Ann. § 3767.01(C) (1988) (defining public "nuisance" as "that which is defined and declared by statutes to be such and . . . any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives [and so on, are exhibited]"); Ohio Rev. Code Ann. § 4715.30(A) (Supp. 1989) (providing that "[t]he holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for . . . [e]ngaging in lewd or immoral conduct in connection with the provision of dental services"); Ohio Rev. Code Ann. § 4931.31 (1977) ("No person shall, while communicating with any other person over a telephone, . . . use or address to such other person any words or language of a lewd, lascivious, or indecent character, nature, or connotation for the sole purpose of annoying such other person").

The Ohio Supreme Court did not refer to any of these provisions in articulating its "lewd exhibition" standard, and they provide little guidance in deciphering the "lewd exhibition of nudity" test. Indeed, although the Ohio public nuisance statute, § 3767.01(C), contains the phrase "lewdness, assignation, or prostitution," it has been interpreted to refer only to conduct or behavior and not to photographs and other printed materials. See *Ohio* v. *Pizza*, No. L–88–045, 18 (Ohio Ct. App., Mar. 10, 1989), p. 18. Thus, Ohio has followed those States that have determined that "the term 'lewdness' does *not* apply to persons who sell pornography." *Chicago* v. *Geraci*, 30 Ill. App. 3d 699, 704, 332 N. E. 2d 487, 492 (1975) (emphasis

Thus, when the Ohio Supreme Court grafted the "lewd exhibition" test onto the definition of nudity, it was venturing into uncharted territory.[9]

Moreover, there is no longstanding, commonly understood definition of "lewd" upon which the Ohio Supreme Court's construction might be said to draw that can save the "lewd exhibition" standard from impermissible vagueness.[10] At

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added); see also *Chicago* v. *Festival Theatre Corp.*, 91 Ill. 2d 295, 302, 438 N. E. 2d 159, 161–162 (1982) (noting that various courts have held that "'lewdness, assignation, or prostitution'" abatement statutes are not applicable to obscene films or books).

[9] Indeed, in other contexts the Ohio Supreme Court has recognized the difficulty of defining the term "lewd." See, *e. g.*, *Columbus* v. *Rogers*, 41 Ohio St. 2d 161, 163–165, 324 N. E. 2d 563, 565–566 (1975) (holding void for vagueness city ordinance providing that "'[n]o person shall appear on any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress'"); *Columbus* v. *Schwarzwalder*, 39 Ohio St. 2d 61, 62–63, 313 N. E. 2d 798, 800 (1974) *(per curiam)* (reversing, on grounds of overbreadth, convictions under disorderly conduct ordinance that prohibited "'disturb[ing] the good order and quiet of the city'" and "'otherwise violat[ing] the public peace by indecent and disorderly conduct or by lewd or lascivious behavior'"); see also *South Euclid* v. *Richardson*, Nos. 54247, 54248 (Ohio Ct. App., Aug. 18, 1988), pp. 1–2 (invalidating as vague and overbroad municipal ordinance stating that "'no person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct,'" and that defined "'lewdness'" as "'sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals'").

[10] Historically, prohibitions on "lewd" acts grew out of "the archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." *Pryor* v. *Municipal Court for Los Angeles*, 25 Cal. 3d 238, 248, 599 P. 2d 636, 641 (1979). We held such vagrancy laws unconstitutionally vague in *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972). Cf. Ohio Rev. Code § 715.55 (1976) ("Any municipal corporation may provide for: (A) The punishment of persons disturbing the good order and quiet of the municipal corporation by clamors and noises in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by

common law, the term "lewd" included "any gross indecency so notorious as to tend to corrupt community morals," *Collins* v. *State*, 160 Ga. App. 680, 682, 288 S. E. 2d 43, 45 (1981), an approach that was "subjective" and dependent entirely on a speaker's "social, moral, and cultural bias." *Morgan* v. *Detroit*, 389 F. Supp. 922, 930 (ED Mich. 1975).[11] Not surprisingly, States with long experience in applying indecency laws have learned that the word "lewd" is "too indefinite and uncertain to be enforceable." *Courtemanche* v. *State*, 507 S. W. 2d 545, 546 (Tex. Cr. App. 1974). See also *Attwood* v. *Purcell*, 402 F. Supp. 231, 235 (Ariz. 1975); *District of Columbia* v. *Walters*, 319 A. 2d 332, 335–336 (D. C. 1974). The term is often defined by reference to such pejorative synonyms as "'lustful, lascivious, unchaste, wanton, or loose in morals and conduct.'" *People* v. *Williams*, 59 Cal. App. 3d 225, 229, 130 Cal. Rptr. 460, 462 (1976). But "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify." *State* v. *Kueny*, 215 N. W. 2d 215, 217 (Iowa 1974). "To instruct the jury that a 'lewd or dissolute' act is one which is morally 'loose,' or 'lawless,' or 'foul' piles additional un-

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lewd or lascivious behavior. (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself'") (emphasis added).

[11] Virtually any act running afoul of "conventional" morality can be and has been sanctioned under "lewdness" laws. See, *e. g.*, *Jelly* v. *Dabney*, 581 P. 2d 622, 626 (Wyo. 1978) (describing, as punishable under "lewdness" prohibition, crime of "illicit cohabitation," *i. e.*, a "dwelling or living together by a man and woman, not legally married to each other, in the manner of husband and wife, and indulgence in acts of sexual intercourse") (quotation omitted); *Egal* v. *State*, 469 So. 2d 196, 198 (Fla. App. 1985) ("'[I]f forty years ago either a man or a woman had donned the apparel popular on our beaches today . . . such person would probably have been . . . branded as a lewd, lascivious, and indecent person'") (quoting *State ex rel. Swanboro* v. *Mayo*, 155 Fla. 330, 332, 19 So. 2d 883, 884 (1944)).

certainty upon the already vague words of the statute. In short, vague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainty." *Pryor* v. *Municipal Court for Los Angeles*, 25 Cal. 3d 238, 249, 599 P. 2d 636, 642 (1979).

The Ohio Supreme Court, moreover, did not specify the perspective from which "lewdness" is to be determined. A "reasonable" person's view of "lewdness"? A reasonable pedophile's? An "average" person applying contemporary local community standards? Statewide standards? Nationwide standards? Cf. *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 133–134 (1989); *Pope* v. *Illinois*, 481 U. S. 497, 500–501 (1987); *Pinkus* v. *United States*, 436 U. S. 293, 302–303 (1978); *Smith* v. *United States*, 431 U. S. 291, 300, n. 6 (1977); *Miller* v. *California*, 413 U. S. 15, 24 (1973); *Mishkin* v. *New York*, 383 U. S. 502, 508 (1966). In sum, the addition of a "lewd exhibition" standard does not narrow adequately the statute's reach. If anything, it creates a new problem of vagueness, affording the public little notice of the statute's ambit and providing an avenue for "'policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983) (quoting *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974)); see also *Houston* v. *Hill*, 482 U. S. 451, 465, and n. 15 (1987).[12] Given the important First Amendment interests

[12] The danger of discriminatory enforcement assumes particular importance of the context of the instant case, which involves child pornography with male homosexual overtones. Sadly, evidence indicates that the overwhelming majority of arrests for violations of "lewdness" laws involve male homosexuals. See *Pryor*, *supra*, at 252, n. 8, 599 P. 2d, at 644, n. 8. Cf. *Houston* v. *Hill*, 482 U. S. 451 (1987) (prosecution of male homosexual for interfering with a police officer in the performance of his duties); Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1509, 1537–1538, 1542 (1989). "Such uneven application of the law is the natural consequence of a statute which as judicially construed measure[s] the criminality of conduct by community or even individual notions of what is distasteful behavior." *Pryor*, *supra*, at 252, 599 P. 2d, at 644. The

at issue, the vague, broad sweep of the "lewd exhibition" language means that it cannot cure § 2907.323(A)(3)'s overbreadth.

2

The Ohio Supreme Court also added a "graphic focus" element to the nudity definition. This phrase, a stranger to obscenity regulation, suffers from the same vagueness difficulty as "lewd exhibition." Although the Ohio Supreme Court failed to elaborate what a "graphic focus" might be, the test appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture or other representation. Not only is this factor dependent on the perspective and idiosyncrasies of the observer, it also is unconnected to whether the material at issue merits constitutional protection. Simple nudity, no matter how prominent or "graphic," is within the bounds of the First Amendment. Michelangelo's "David" might be said to have a "graphic focus" on the genitals, for it plainly portrays them in a manner unavoidable to even a casual observer. Similarly, a painting of a partially clad girl could be said to involve a "graphic focus," depending on the picture's lighting and emphasis,[13] as could the depictions of nude children on the friezes that adorn our courtroom. Even a photograph of a child running naked on the beach or playing in the bathtub might run afoul of the law, depending on the focus and camera angle.

In sum, the "lewd exhibition" and "graphic focus" tests are too vague to serve as any workable limit. Because the stat-

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"lewd exhibition" standard "'furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."'" *Kolender* v. *Lawson*, 461 U. S., at 360 (quoting *Papachristou*, 405 U. S., at 170, in turn quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940)).

[13] Since § 2907.323(A)(3) makes it to crime to "view" as well as to possess depictions of nudity, visitors to an art gallery might find themselves in violation of the law.

ute, even as construed authoritatively by the Ohio Supreme Court, is impermissibly overbroad, I would hold that appellant cannot be retried under it.[14]

II

Even if the statute was not overbroad, our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), forbids the criminalization of appellant's private possession in his home of the materials at issue. "If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.*, at 565. Appellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. Appellant testified that he had been given the pictures in his home by a friend. There was no evidence that the photographs had been produced commercially or distributed. All were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.

In these circumstances, the Court's focus on *Ferber* rather than *Stanley* is misplaced. *Ferber* held only that child pornography is "a category of material the *production* and *distribution* of which is not entitled to First Amendment protection," 458 U. S., at 765 (emphasis added); our decision did not extend to private *possession*. The authority of a State to regulate the production and distribution of such materials is

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[14] The scope of § 2907.323(A)(3) is restricted to depictions of "a minor who is not the person's child or ward." This does not cure the overbreadth problem, because many constitutionally protected photographs outlawed by the statute, such as commercial advertisements and works of art, circulate outside of the subject's immediate family. See also *ante*, at 124 ("'Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law . . . . So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute'") (quoting Tr. 3–4).

not dispositive of its power to penalize possession.[15] Indeed, in *Stanley* we assumed that the films at issue were obscene and that their production, sale, and distribution thus could have been prohibited under our decisions. See 394 U. S., at 559, n. 2. Nevertheless, we reasoned that although the States "retain broad power to regulate obscenity"—and child pornography as well—"that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.*, at 568. *Ferber* did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed. The distinction established in *Stanley* between *what* materials may be regulated and *how* they may be regulated still stands. See *United States* v. *Miller*, 776 F. 2d 978, 980, n. 4 (CA11 1985) *(per curiam); People* v. *Keyes*, 135 Misc. 2d 993, 995, 517 N. Y. S. 2d 696, 698 (1987). As JUSTICE WHITE remarked in a different context: "The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by

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[15] The distinction drawn in *Stanley* is not an anomaly in the law; to the contrary, we have often protected expression valued by listeners, whether or not the *source* of the communication was fully entitled to the safeguards of the First Amendment. See, *e. g.*, *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U. S. 1, 8 (1986) (plurality opinion); *Consolidated Edison Co. of New York* v. *Public Service Comm'n of New York*, 447 U. S. 530, 533–534, and n. 1 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, and n. 13 (1978); *Lamont* v. *Postmaster General*, 381 U. S. 301, 307–308 (1965) (BRENNAN, J., concurring). Just as the right of a listener to receive information does not rest on the right of the producer to disseminate it, so the power to ban the production and distribution of child pornography does not imply a concomitant authority to proscribe mere possession.

the Constitution." *United States* v. *Reidel*, 402 U. S. 351, 356 (1971).

The Court today finds *Stanley* inapposite on the ground that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*." *Ante*, at 108. The majority's analysis does not withstand scrutiny.[16] While the sexual exploitation of children is undoubtedly a serious problem, Ohio may employ other weapons to combat it. Indeed, the State already has enacted a panoply of laws prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. See n. 1, *supra*. Ohio has not demonstrated why these laws are inadequate and why the State must forbid mere possession as well.

The Court today speculates that Ohio "will decrease the production of child pornography if it penalizes those who

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[16] Although we held in *Stanley* v. *Georgia* that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," 394 U. S., at 568, we acknowledged that "compelling reasons may exist for overriding the right of the individual to possess" other types of "printed, filmed, or recorded materials." *Id.*, at 568, n. 11. The majority's reference to this language as support for its decision today, see *ante*, at 110, ignores the fact that footnote 11 in *Stanley* cited only to 18 U. S. C. § 793(d), which criminalizes possession of defense information harmful to U. S. national security. To equate child pornography with state secrets is to read the narrow exception carved in footnote 11 of *Stanley* as swallowing the general rule that the case established. See *State* v. *Meadows*, No. C–850091 (Ohio Ct. App., Dec. 18, 1985) (Doan, J., concurring) ("The reservation [in footnote 11 of *Stanley*] applies to traitorous or seditious materials, and not to child pornography"), rev'd, 28 Ohio St. 3d 43, 503 N. E. 2d 697 (1986), cert. denied, 480 U. S. 936 (1987); see also *Meadows*, 28 Ohio St. 3d, at 356–357, 503 N. E. 2d, at 716 (Brown, J., concurring). Although our decisions even in the First Amendment area have taken special note of the paramount importance of national security interests, see, *e. g.*, *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931), we nonetheless have required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed. See, *e. g.*, *New York Times Co.* v. *United States*, 403 U. S. 713, 726–727 (1971) (BRENNAN, J., concurring).

possess and view the product, thereby decreasing demand." *Ante*, at 109–110. Criminalizing possession is thought necessary because "since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Ante*, at 110–111. As support, the Court notes that 19 States have "found it necessary" to prohibit simple possession. *Ibid.* Even were I to accept the Court's empirical assumptions,[17] I would find the Court's

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[17] That 19 States have prohibited possession of child pornography hardly proves that such an approach is integral to effective enforcement of production and distribution laws. A restriction on speech cannot be justified by such self-referential reasoning. In fact, the difficulty of enforcing possession laws—for example, the requirements of probable cause and a warrant before a search may be undertaken—means that penalties for possession are dubious complements to curbs on production, sale, and distribution. See Note, Private Possession of Child Pornography: The Tensions Between *Stanley* v. *Georgia* and *New York* v. *Ferber*, 29 Wm. & Mary L. Rev. 187, 212 (1987) ("Statutory prohibition of the private possession of child pornography is an inefficient and ineffective means of preventing the serious problem of child sexual abuse").

The federal experience illustrates that possession laws are not an essential element of a successful enforcement strategy. In the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95–225, 92 Stat. 7, Congress prohibited the production, distribution, and sale of material depicting sexually explicit conduct by minors. See 18 U. S. C. §§ 2251–2253 (1982 ed.). Congress also criminalized the mailing, receipt, or trafficking in interstate or foreign commerce of such material for the purpose of sale or distribution for sale. See 18 U. S. C. § 2252(a) (1982 ed.). But Congress did *not* criminalize mere possession. In the Child Protection Act of 1984, Pub. L. 98–292, 98 Stat. 204, Congress enacted a broad revision of the 1977 law, removing the requirement that trafficking, receipt, and mailing be for the purposes of sale or distribution for sale. See 18 U. S. C. § 2252(a). Further, the 1984 Act eliminated a requirement that material be "obscene" before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal, see § 2252(a); raised the age limit of protection from 16 to 18 years of age, see § 2256(1); and added stiffer penalties, see § 2252(b), criminal and civil forfeiture provisions, see §§ 2253, 2254, and a civil remedy for personal injuries. See § 2255. Even in the

approach foreclosed by *Stanley*, which rejected precisely the same contention Ohio makes today:

> "[W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 U. S., at 567–568.

At bottom, the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.[18] While I share the majority's

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1984 amendments, Congress did not find it necessary to ban simple possession. Nevertheless, the Attorney General's Commission on Pornography determined that "the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry." 1 U. S. Dept. of Justice, Attorney General's Commission on Pornography, Final Report 607 (1986) (hereafter Attorney General's Report).

[18] The Court briefly identifies two other interests that it contends justify Ohio's law. First, the majority describes a state interest in destroying the "permanen[t] record" of the victim's abuse. *Ante*, at 111. I do not believe that the law is narrowly tailored to this end, for there is no requirement that the State show that the child was abused in the production of the materials or even that the child knew that a photograph was taken. Even if the State could recover all copies of the offensive picture, which seems highly unlikely, I do not see how a candid shot taken without the minor's knowledge can "haun[t]" him or her in the years to come, *ibid.*, when there is no indication that the child is even aware of its existence. And if the law's purpose is preventing sexual abuse of children, it is underinclusive to the extent that it does not prevent *parents* from photographing their chil-

concerns, I do not believe that it has struck the proper balance between the First Amendment and the State's interests, especially in light of the other means available to Ohio to

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dren in a state of nudity, see, *e. g.*, *Massachusetts* v. *Oakes*, 491 U. S. 576 (1989), or giving others written permission to do so. See, *e. g.*, *Faloona* v. *Hustler Magazine, Inc.*, 607 F. Supp. 1341 (ND Tex. 1985). The only restriction on parents is the nebulous "proper purposes" provision, which is really no restriction at all. See n. 2, *supra*. More fundamentally, even if the State could presume that minors are legally incompetent to consent to sexually explicit photographs, and therefore that all such photographs could be outlawed, it does not follow that the State can prohibit *possession* of such pictures in addition to their *production*. In *Ferber*, the Court was careful to limit its discussion to the "distribution" and "circulation" of photographs taken without a minor's consent. See 458 U. S., at 759 and n. 10; cf. *Butterworth* v. *Smith*, 494 U. S. 624, 635–636 (1990); *The Florida Star* v. *B. J. F.*, 491 U. S. 524, 532–533 (1989); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 103 (1979); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491 (1975). By analogy, *Stanley* assuredly protects the private possession of obscene adult pornography, even though an argument could be made that "production of adult pornography can be as harmful to adult actors as the production of child pornography is to child actors." Note, 29 Wm. & Mary L. Rev., *supra*, at 204, n. 144; see also Attorney General's Report, *supra* n. 17, at 839–900; Pollard, Regulating Violent Pornography, 43 Vand. L. Rev. 125, 133–134 (1990).

Second, the Court maintains that possession of child pornography may be prohibited "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Ante*, at 111 (citing, in a footnote, the Attorney General's Commission on Pornography). The Attorney General's Commission, however, determined that pedophiles are likely to use *adult* as well as *child* pornography to lower the inhibitions of a child victim. See Attorney General's Report, *supra* n. 17, at 686; see also Brief for Covenant House et al. as *Amici Curiae* 8, n. 9 (characterizing the Court's argument on this point as "factual speculation"). Finally, Ohio's solution—prohibiting private possession—ignores fundamental principles of our First Amendent jurisprudence. "Assuming obscene material could be proved to create a . . . danger of illegal behavior, it would not follow that the expression should be suppressed. Rather, the basic principles of a system of freedom of expression would require that society deal directly with the . . . action and leave the expression alone." T. Emerson, The System of Freedom of Expression 494 (1970). See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 108–110 (BRENNAN, J., dissenting). Thus,

protect children from exploitation and the State's failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production.[19] "The existence of the State's power to prevent the distribution of obscene matter"—and of child pornography—"does not mean that there can be no constitutional barrier to any form of practical exercise of that power." *Smith* v. *California*, 361 U. S. 147, 155 (1959).

III

Although I agree with the Court's conclusion that appellant's conviction must be reversed because of a violation of due process, I do not subscribe to the Court's reasoning regarding the adequacy of appellant's objections at trial. See *ante*, at 122–125. The majority determines that appellant's due process rights were violated because the jury was not instructed according to the interpretation of § 2907.323(A)(3) adopted by the Ohio Supreme Court on appeal. That is to say, the jury was not told that "the State must prove both scienter and that the defendant posssessed material depicting a lewd exhibition or a graphic focus on genitals." *Ante*, at 123. The Court finds that appellant's challenge to the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements is properly before us, because appellant objected at trial to the overbreadth of § 2907.323(A)(3). See

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while acts of sexual abuse themselves may be outlawed, the private possession of photographs, magazines, and other materials may not.

[19] The notion that possession of pornography may be penalized in order to facilitate a prohibition on its production, whatever the rights of possessors, is not unlike a proposal that newspaper subscribers be held criminally liable for receiving the newspaper if they are aware of the publisher's violations of child labor laws. Cf. L. Tribe, American Constitutional Law 915 (2d ed. 1988). In both cases, sanctions against possession might increase the effectiveness of concededly permissible regulations on the production process. But although the need to protect children from exploitation may be acute, it cannot override the right to receive the newspaper or to possess sexually explicit materials in the privacy of the home, especially when less restrictive alternatives exist to further the state interests asserted.

ante, at 123–124. I agree with the Court's conclusion that we may reach the merits of appellant's claim on this point.[20]

But the Court does not rest there. Instead, in what is apparently dictum given its decision to reverse appellant's conviction on the basis of the first due process claim, the Court maintains that a separate due process challenge by appellant arising from the Ohio Supreme Court's addition of a scienter element is procedurally barred because appellant failed to object at trial to the absence of a scienter instruction. The Court maintains that § 2907.323(A)(3) must be interpreted in light of § 2901.21(B) of the Ohio Revised Code, which provides that recklessness is the appropriate *mens rea* where a statute "'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" *Ante*, at 113, n. 9, and

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[20] The Court's opinion should not be taken to mean that appellant's due process claim with respect to the "lewd exhibition" and "graphic focus" elements would be procedurally barred now had he failed to object at trial. If appellant's due process contention were nothing more than a complaint concerning the statute's overbreadth, the suggestion that he would be barred from raising it now if he failed to object at trial might be plausible. But that is not appellant's argument. Rather, he maintains that his due process rights were violated because the Ohio Supreme Court affirmed his conviction after adding the elements of "lewd exhibition" and "graphic focus" on appeal, despite the fact that appellant had had no reason to design a defense strategy or introduce evidence with these tests in mind. The jury, moreover, might have convicted appellant purely on the basis of the "nudity" definition, without deciding whether the materials depicted a "lewd exhibition of nudity" or involved a "graphic focus" on the genitals. Thus, appellant's due process claim is separate from his overbreadth challenge, see *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 92 (1965), as even the Court appears to recognize at some places in its opinion. See *ante*, at 121 ("Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause"). The due process violation in this case was not complete until the Ohio Supreme Court affirmed appellant's conviction after reinterpreting the statute. Requiring defendants to object *at trial* to an error that does not appear until the appellate stage would advance no legitimate state interest regarding finality or compliance with state procedures.

122–123. I cannot agree with this gratuitous aspect of the Court's reasoning.

First, the overbreadth contention voiced by appellant must be read as fairly encompassing an objection both to the lack of an intent requirement and to the definition of "nudity." Appellant objected to, *inter alia*, the criminalization of the "mere possession or viewing of a photograph," without the need for the State to show additional elements. Tr. 4. A natural inference from this language is that intent is one of the additional elements that the State should have been required to prove. There is no need to demand any greater precision from a criminal defendant, and in my judgment the overbreadth challenge was sufficient, as a matter of federal law, to preserve the due process claim arising from the addition of a scienter element. As the majority acknowledges, our decision in *Ferber* mandated that "prohibitions on child pornography include some element of scienter." *Ante*, at 115 (citing *Ferber*, 458 U. S., at 765). In *Ferber* we recognized that adding an intent requirement was part of the process of narrowing an otherwise overbroad statute, and appellant's contention that the statute was overbroad should be interpreted in that light. I find the Ohio Supreme Court's logic internally contradictory: In one breath it adopted a scienter requirement of recklessness to narrow the statute in response to appellant's overbreadth challenge, and then, in the next breath, it insisted that appellant had failed to object to the lack of a scienter element.

Second, even if appellant had failed to object at trial to the failure of the jury instructions to include a scienter element, I cannot agree with the reasoning of the Ohio Supreme Court, unquestioned by the majority today, that "the omission of the element of recklessness [did] not constitute plain error." 37 Ohio St. 3d, at 254, 525 N. E. 2d, at 1370. To the contrary, a judge's failure to instruct the jury on every element of an offense violates a "'bedrock, "axiomatic and elementary" [constitutional] principle,'" *Francis* v. *Franklin*, 471 U. S.

307, 313 (1985) (quoting *In re Winship*, 397 U. S. 358, 363 (1970)), and is cognizable on appeal as plain error. Cf. *Carella* v. *California*, 491 U. S. 263, 268–269 (1989) (SCALIA, J., concurring in judgment); *Rose* v. *Clark*, 478 U. S. 570, 580, n. 8 (1986); *Connecticut* v. *Johnson*, 460 U. S. 73, 85–86 (1983) (plurality opinion); *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979). "[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, . . . it is necessary to take note of it on our own motion." *Screws* v. *United States*, 325 U. S. 91, 107 (1945) (plurality opinion).

Thus, I would find properly before us appellant's due process challenge arising from the addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests.

IV

When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law. I respectfully dissent.

Syllabus

WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 88–7146. Argued January 10, 1990—Decided April 24, 1990

After his trial on multiple murder charges, Ronald Simmons waived his right to direct appeal of his conviction and death sentence. The trial court conducted a hearing and determined that Simmons was competent to waive further proceedings. Pursuant to its rule that Arkansas law does not require a mandatory appeal in all death penalty cases, but that a defendant can forgo his direct appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence, the State Supreme Court reviewed the competency determination and affirmed the trial court's decision that Simmons had knowingly and intelligently waived the right to appeal. The court then denied the motion of petitioner Whitmore—a death-row inmate convicted in a robbery-murder case, who had exhausted his direct appellate review, been denied state postconviction relief, and not yet sought federal habeas corpus relief—to intervene in the proceeding both individually and as Simmons' "next friend," concluding that Whitmore lacked standing. This Court granted Whitmore's petition for certiorari on the questions whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal, and whether the Eighth and Fourteenth Amendments prohibit the State from carrying out a death sentence without first conducting a mandatory appellate review of the conviction and sentence.

Held: Whitmore lacks standing to proceed in this Court. Pp. 154–166.

(a) Before a federal court can consider the merits of a legal claim, the person seeking to invoke the court's jurisdiction must establish the requisite standing to sue. To do so, he must prove the existence of an Art. III case or controversy by clearly demonstrating that he has suffered an "injury in fact," which is concrete in both a qualitative and temporal sense. He must show that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 38, 41. Pp. 154–156.

(b) Whitmore does not have standing in his individual capacity based on a legal right to a system of mandatory appellate review assertedly granted to him personally and to Simmons by the Eighth Amendment.

His principal claim of injury in fact—that if he obtains federal habeas relief but is convicted and resentenced to death in a new trial, then, in light of Arkansas' comparative review in death penalty cases, he has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of Simmons' heinous crimes—is too speculative to invoke Art. III jurisdiction. Even assuming that Whitmore would eventually secure habeas relief and be convicted and resentenced to death, there is no factual basis on which to conclude that the sentence imposed on a mass murderer would be relevant to a future comparative review of his robbery-murder sentence. His theory is at least as speculative as other allegations of possible future injury that have been found insufficient to establish Art. III injury in fact. See, *e. g.*, *O'Shea* v. *Littleton*, 414 U. S. 488. *United States* v. *SCRAP*, 412 U. S. 669, distinguished. Whitmore's further contention that, as an Arkansas citizen, he is entitled to the Eighth Amendment's public interest protections and has a right to invoke this Court's jurisdiction to insure that the State does not carry out an execution without mandatory appellate review raises only the generalized interest of all citizens in constitutional governance and is an inadequate basis on which to grant him standing. Nor does the uniqueness of the death penalty and society's interest in its proper imposition justify creating an exception to traditional standing doctrine, since the requirement of an Art. III case or controversy is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. Pp. 156–161.

(c) Whitmore's alternative argument that he has standing as Simmons' "next friend" is also rejected. The scope of any federal "next friend" standing doctrine, assuming that one exists absent congressional authorization, is no broader than the "next friend" standing permitted under the federal habeas corpus statute. Thus, one necessary condition is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability. That prerequisite is not satisfied where, as here, an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded. Pp. 161–166.

298 Ark. 193 and 255, 766 S. W. 2d 422 and 423, certiorari dismissed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 166.

Arthur L. Allen, by appointment of the Court, 493 U. S. 804, argued the cause and filed a brief for petitioner.

J. Steven Clark, Attorney General of Arkansas, argued the cause for respondents. With him on the brief for respondent State of Arkansas was *Clint Miller*, Assistant Attorney General. *John Harris* filed a brief for respondent Simmons.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal to the State Supreme Court. Petitioner Jonas Whitmore contends that the Eighth and Fourteenth Amendments prevent the State of Arkansas from carrying out the death sentence imposed on Ronald Gene Simmons without first conducting a mandatory appellate review of Simmons' conviction and sentence. We hold that petitioner lacks standing, and therefore dismiss the writ of certiorari.

I

On December 28, 1987, Ronald Gene Simmons shot and killed two people and wounded three others in the course of a rampage through the town of Russellville, Arkansas. After police apprehended Simmons, they searched his home in nearby Dover, Arkansas, and discovered the bodies of 14 members of Simmons' family, all of whom had been murdered. The State filed two sets of criminal charges against

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**Gary B. Born, Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

William Webster, Attorney General of Missouri, *John M. Morris* and *Stephen D. Hawke*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Jim Jones*, Attorney General of Idaho, *Hal Stratton*, Attorney General of New Mexico, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *T. Travis Medlock*, Attorney General of South Carolina, and *Mary Sue Terry*, Attorney General of Virginia, filed a brief for the State of Missouri et al. as *amici curiae*.

Simmons, one based on the two Russellville murders and the other covering the deaths of his family members.

Simmons was first tried for the Russellville crimes, and a jury convicted him of capital murder and sentenced him to death. After being sentenced, Simmons made this statement under oath: "'I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously.'" See *Franz* v. *State*, 296 Ark. 181, 183, 754 S. W. 2d 839, 840 (1988). The trial court conducted a hearing concerning Simmons' competence to waive further proceedings, and concluded that his decision was knowing and intelligent.

As Simmons' execution date approached Louis J. Franz, a Catholic priest who counsels inmates at the Arkansas Department of Corrections, petitioned the Supreme Court of Arkansas for permission to proceed as Simmons' "next friend" and to prosecute an appeal on his behalf. The court held that Franz did not have standing as "next friend," because he had not alleged facts showing that he had ever met Simmons, much less that he had a close relationship with the defendant. It also rejected both his argument for standing under the Arkansas Constitution as an aggrieved taxpayer and his assertion that he should have standing as a concerned citizen to prevent an important legal issue from going unresolved at the appellate level.

In dicta, the court went on to state that Arkansas law does not require a mandatory appeal in all death penalty cases. It did note, however, that a defendant sentenced to death in Arkansas will be able to forgo his direct appeal "only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Id.*, at 189, 754 S. W. 2d, at 843. After reviewing the record of the trial court's competency hearing, the Supreme Court

held that Simmons had made a knowing and intelligent waiver of his right to appeal. Franz and another Arkansas death row inmate, Darrel Wayne Hill, then applied in Federal District Court for a writ of habeas corpus to prevent Simmons' execution, but the petition was denied on the ground that Franz and Hill did not have standing. *Franz* v. *Lockhart*, 700 F. Supp. 1005 (ED Ark. 1988), appeal pending, No. 89–1485EA (CA8).

The State subsequently tried Simmons for the murder of his 14 family members, and on February 10, 1989, a jury convicted him of capital murder and imposed a sentence of death by lethal injection. Simmons again notified the trial court of his desire to waive his right to direct appeal, and after a hearing, the court found Simmons competent to do so. The Supreme Court of Arkansas, pursuant to the rule established in *Franz*, reviewed the competency determination and affirmed the trial court's decision that Simmons had knowingly and intelligently waived his right to appeal. *Simmons* v. *State*, 298 Ark. 193, 766 S. W. 2d 422 (1989). The court commended the trial court and Simmons' counsel for doing "an exceptional job in examining and exploring [Simmons'] capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all right he might have in an appeal of his sentence." *Id.*, at 194, 766 S. W. 2d, at 423. The court also noted that Simmons' counsel "thoroughly discussed seven possible points that could be argued for reversal on appeal" and that Simmons acknowledged those points but "rejected all encouragement and suggestions to appeal." *Ibid.*

Three days later, petitioner Jonas Whitmore, another death row inmate in Arkansas, sought permission from the Supreme Court of Arkansas to intervene in Simmons' proceeding both individually and "as next friend of Ronald Gene Simmons." The court concluded that Whitmore had failed to show he had standing to intervene, and it denied the motion. *Simmons* v. *State*, 298 Ark. 255, 766 S. W. 2d 423 (1989).

Whitmore then asked this Court to stay Simmons' execution, which was scheduled for March 16, 1989. We granted a stay pending the filing and disposition of a petition for certiorari, 489 U. S. 1073 (1989), and later granted Whitmore's petition for certiorari. 492 U. S. 917 (1989).

II

A

This is not the first time we have encountered a third party seeking to prevent the execution of a capital defendant who has decided to forgo further judicial proceedings. In *Gilmore* v. *Utah*, 429 U. S. 1012 (1976), we considered an application for a stay of the execution of Gary Mark Gilmore, filed by his mother Bessie Gilmore after the defendant declined to request relief. A majority of the Court concluded that Gilmore had made a knowing and intelligent waiver of any federal rights available to him and, accordingly, allowed the execution to go forward. Four Members of the Court, however, felt that the standing and other constitutional issues raised by the application were substantial and would have given the matter plenary consideration. Since *Gilmore*, we have been presented with other applications from third parties for stays of execution, see *Lenhard* v. *Wolff*, 443 U. S. 1306, stay of execution denied, 444 U. S. 807 (1979); *Evans* v. *Bennett*, 440 U. S. 1301, stay of execution denied, 440 U. S. 987 (1979), but until the present case, we have not requested full briefing and argument and issued an opinion of the Court on this recurring issue.

Petitioner Whitmore asks this Court to hold that despite Simmons' failure to appeal, the Eighth and Fourteenth Amendments require the State of Arkansas to conduct an appellate review of his conviction and sentence before it can proceed to execute him. It is well established, however, that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue. Article III, of course,

gives the federal courts jurisdiction over only "cases and controversies," and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 471–476 (1982). Our threshold inquiry into standing "in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal," *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975), and we thus put aside for now Whitmore's Eighth Amendment challenge and consider whether he has established the existence of a "case or controversy."

Although we have acknowledged before that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Valley Forge*, *supra*, at 475, certain basic principles have been distilled from our decisions. To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," *Warth*, *supra*, at 501, as opposed to merely "[a]bstract," *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles* v. *Lyons*, 461 U. S. 95, 101–102 (1983). Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 38, 41 (1976); *Valley Forge*, *supra*, at 472. The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own

jurisdiction by embellishing otherwise deficient allegations of standing. See *Warth*, *supra*, at 508, 518.[1]

B

As we understand Whitmore's claim of standing in his individual capacity, he alleges that the State has infringed rights that the Eighth Amendment grants to him personally and to the subject of the impending execution, Simmons. He therefore rests his claim to relief both on his own asserted legal right to a system of mandatory appellate review and on Simmons' similar right. Under either theory, Whitmore must establish Art. III standing, see *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 956 (1984); *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976), and we find that his allegations fall short of doing so.

Whitmore's principal claim of injury in fact is that Arkansas has established a system of comparative review in death penalty cases, and that he has "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case." Brief for Petitioner 21. Although he has already been convicted of murder and sentenced to death, has exhausted his direct appellate review, see *Whitmore* v. *State*, 296 Ark. 308, 756 S. W. 2d 890 (1988), and has been denied state postconviction relief, *Whitmore* v. *State*, 299 Ark. 55, 771 S. W. 2d 266 (1989), petitioner suggests that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in that new trial, Whitmore is again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas; that court would compare Whitmore's case with other capital cases to insure that the death penalty

[1] In addition to the constitutional requirements of Art. III, the court has developed several now-familiar prudential limitations on standing. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472–475 (1982). These limitations are not involved in this case.

is not freakishly or arbitrarily applied in Arkansas. Petitioner asserts that he would ultimately be injured by the State Supreme Court's failure to review Simmons' death sentence, because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review. The injury would be redressed by an order from this Court that the Eighth Amendment requires mandatory appellate review.

Petitioner's alleged injury is too speculative to invoke the jurisdiction of an Art. III court. Whitmore's conviction and death sentence are final, and his claim that he may eventually secure federal habeas relief from his conviction is obviously problematic. Nor, although the odds may well be better, can petitioner prove that if he were to obtain habeas relief, he would be retried, convicted, and again sentenced to death. And even were we to follow Whitmore this far down the path, it is nothing more than conjecture that the addition of Simmons' crimes to a comparative review "data base" would lead the Supreme Court of Arkansas to set aside a death sentence for Whitmore, whose victim died after he stabbed her 10 times, cut her throat, and carved an "X" on the side of her face. 296 Ark., at 317, 756 S. W. 2d, at 895. In its comparative review of Whitmore's current sentence, the Arkansas court simply noted that defendants in similar robbery-murder capital crimes had also been sentenced to death. *Ibid.* Whitmore provides no factual basis for us to conclude that the sentence imposed on a mass murderer like Simmons would even be relevant to a future comparative review of Whitmore's sentence.

Whitmore's theory of injury is at least as speculative as others we have found insufficient to establish Art. III injury in fact. In *O'Shea* v. *Littleton*, *supra*, we held there was no case or controversy where residents of an Illinois town sought injunctive relief against a Magistrate and a Circuit Court Judge whom the plaintiffs claimed were engaged in a pattern and practice of illegal bondsetting, sentencing, and

jury-fee practices in criminal cases. The allegation of respondents (plaintiffs) in that case amounted to a claim "that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed." *Id.*, at 497. That contention, which we think is analogous to Whitmore's, took us "into the area of speculation and conjecture," *ibid.*, and beyond the bounds of our jurisdiction.

We have likewise thought inadequate allegations of future injury contingent on a plaintiff having an encounter with police wherein police would administer an allegedly illegal "chokehol[d]," *Los Angeles* v. *Lyons*, 461 U. S., at 105, on the prospective future candidacy of a former Congressman, *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969), and on police using deadly force against a person fleeing from an as yet uneffected arrest. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172, n. 2 (1977). Recently in *Diamond* v. *Charles*, 476 U. S. 54 (1986), we rejected a physician's attempt to defend a state law restricting abortions, because his complaint that fewer abortions would lead to more paying patients was "'unadorned speculation'" insufficient to invoke the federal judicial power. *Id.*, at 66 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S., at 44). Each of these cases demonstrates what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be "'certainly impending'" to constitute injury in fact. *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979) (quoting *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923)). See also *Lyons*, *supra*, at 102; *United States* v. *Richardson*, 418 U. S. 166, 177–178 (1974).

Probably the most attenuated injury conferring Art. III standing was that asserted by the respondents in *United States* v. *SCRAP*, 412 U. S. 669 (1973). There, an environ-

mental group challenged the Interstate Commerce Commission's approval of a surcharge on railroad freight rates, claiming that the adverse environmental impact of the ICC's action on the Washington metropolitan area would cause the group's members to suffer "'economic, recreational and aesthetic harm.'" *Id.*, at 678. The SCRAP group alleged that "a general rate increase would . . . cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.*, at 688. The Court held that those pleadings alleged a specific and perceptible harm sufficient to survive a motion to dismiss for lack of standing, but also indicated that the United States could have been entitled to summary judgment on the standing issue if it showed that "the allegations were sham and raised no genuine issue of fact." *Id.*, at 689, and n. 15.

Even under the analysis of the standing question in *SCRAP*, which surely went to the very outer limit of the law, petitioner's asserted injury is not enough to establish jurisdiction. In *SCRAP*, the environmental group alleged that specific and perceptible harms—depletion of natural resources and increased littering—would befall its members imminently if the ICC orders were not reversed. That bald statement, even if incorrect, was held sufficient to withstand a motion to dismiss, because the plaintiffs in *SCRAP* may have been able to show at trial that the string of occurrences alleged would happen immediately. But Whitmore does not make—and could not responsibly make—a similar claim of immediate harm. We can take judicial notice of the fact that writs of habeas corpus are granted in only some cases, and that guilty verdicts are returned after only some trials. It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his

case. Thus, unlike the injury alleged in *SCRAP*, there is no amount of evidence that potentially could establish that Whitmore's asserted future injury is "'real and immediate.'" See *O'Shea*, 414 U. S., at 494. Moreover, as noted above, even if Whitmore could demonstrate with certainty that he would be retried, convicted, and sentenced, he has not shown that Simmons' convictions would be pertinent to his proportionality review in the Supreme Court of Arkansas.

Whitmore also contends that as a citizen of Arkansas, he is "entitled to the public interest protections of the Eighth Amendment," and has a right to invoke this Court's jurisdiction to insure that an execution is not carried out in Arkansas without appellate review. This allegation raises only the "generalized interest of all citizens in constitutional governance," *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 217 (1974), and is an inadequate basis on which to grant petitioner standing to proceed. To dispose of this claim, we need do no more than quote our decision in *Allen* v. *Wright*, 468 U. S. 737, 754 (1984): "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Accord, *Valley Forge College* v. *Americans United*, 454 U. S., at 482–483, and 489–490, n. 26 ("Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a '"personal constitutional right" to a government that does not establish religion,' a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment") (quoting *Americans United for Separation of Church & State, Inc.* v. *United States Dept. of Health, Education and Welfare*, 619 F. 2d 252, 265 (CA3 1980) (citation omitted)); *Schlesinger*, *supra*, at 216–227; *United States* v. *Richardson*, *supra*, at 176–177.

Perhaps recognizing the weakness of his claim for standing, petitioner argues next that the Court should create an exception to traditional standing doctrine for this case. The uniqueness of the death penalty and society's interest in its proper imposition, he maintains, justify a relaxed application of standing principles. The short answer to this suggestion is that the requirement of an Art. III "case or controversy" is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case. We have previously resisted the temptation to "import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law," *Heckler* v. *Chaney*, 470 U. S. 821, 838 (1985); *id.*, at 839–840, n. 2 (BRENNAN, J., concurring), and restraint is even more important when the matter at issue is the constitutional source of the federal judicial power itself.[2] We hold that Whitmore does not have standing in his individual capacity to press an Eighth Amendment objection to Simmons' conviction and sentence.

C

As an alternative basis for standing to maintain this action, petitioner purports to proceed as "next friend of Ronald Gene Simmons." Although we have never discussed the concept

[2] The cases relied upon by petitioner to establish that the strict requirement of standing, in some circumstances, is only a "rule of practice" that can be relaxed in view of countervailing policies are inapposite, because they concern *prudential* barriers to standing, not the mandates of Art. III. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 445 (1972); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965); *United States* v. *Raines*, 362 U. S. 17, 22 (1960). Because we conclude that petitioner has not established Art. III standing, we need not decide whether it would be appropriate in this type of action to relax the general prudential rule that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975).

of "next friend" standing at length, it has long been an accepted basis for jurisdiction in certain circumstances. Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. *E. g., United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 13, n. 3 (1955) (prisoner's sister brought habeas corpus proceeding while he was being held in Korea). As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by "any one on . . . behalf" of detained persons, see 31 Car. II, ch. 2, and in 1704 the House of Lords resolved "[t]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law." See *Ashby* v. *White*, 14 How. St. Tr. 695, 814 (Q. B. 1704). Some early decisions in this country interpreted ambiguous provisions of the federal habeas corpus statute to allow "next friend" standing in connection with petitions for writs of habeas corpus, see, *e. g., Collins* v. *Traeger*, 27 F. 2d 842, 843 (CA9 1928); *United States ex rel. Funaro* v. *Watchorn*, 164 F. 152, 153 (SDNY 1908),[3] and Congress eventually codified

[3] One section of the former habeas corpus statute provided that "[a]pplication for writ of habeas corpus shall be . . . *signed by the person for whose relief it is intended.*" Rev. Stat. § 754; 28 U. S. C. § 454 (1940 ed.) (emphasis added). Nevertheless, the *Collins* and *Watchorn* courts found an implicit authorization of "next friend" standing in § 760 of the revised statutes, which stated that "[t]he petitioner *or* the party imprisoned or restrained may deny any of the facts set forth in the return." Rev. Stat. § 760; 28 U. S. C. § 460 (1940 ed.) (emphasis added). At least one court concluded that "next friend" standing was not available under the old statute. *Ex parte Hibbs*, 26 F. 421, 435 (Ore. 1886). Other courts recognized the ability of third parties to apply for a writ but did not make clear the basis for their decisions. *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916–917 (CA2 1921); *Ex parte Dostal*, 243 F. 664, 668 (ND Ohio 1917). When Congress added the words "or by someone acting in his behalf" to § 754 in 1948, the revisers noted that the change "follow[ed] the actual practice of the courts." Revisers' Notes to 28 U. S. C. § 2242 (1982 ed.).

the doctrine explicitly in 1948. See 28 U. S. C. § 2242 (1982 ed.) ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*") (emphasis added).[4]

A "next friend" does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. *Morgan* v. *Potter*, 157 U. S. 195, 198 (1895); *Nash ex rel. Hashimoto* v. *MacArthur*, 87 U. S. App. D. C. 268, 269–270, 184 F. 2d 606, 607–608 (1950), cert. denied, 342 U. S. 838 (1951). Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. *Wilson* v. *Lane*, 870 F. 2d 1250, 1253 (CA7 1989), cert. pending, No. 89–81; *Smith ex rel. Missouri Public Defender Comm'n* v. *Armontrout*, 812 F. 2d 1050, 1053 (CA8), cert. denied, 483 U. S. 1033 (1987); *Weber* v. *Garza*, 570 F. 2d 511, 513–514 (CA5 1978). Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, see, *e. g.*, *Morris* v. *United States*, 399 F. Supp. 720, 722 (ED Va. 1975), and it has been further

[4] Some courts have permitted "next friends" to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents. See, *e. g*, *Garnett* v. *Garnett*, 114 Mass. 379 (1874) ("next friend" may bring action for divorce on behalf of an insane person); *Campbell* v. *Campbell*, 242 Ala. 141, 5 So. 2d 401 (1941) (same); *Blumenthal* v. *Craig*, 81 F. 320, 321–322 (CA3 1897) ("next friend" was admitted by court to prosecute personal injury action on behalf of the plaintiff, who was a minor); *Baltimore & Ohio R. Co.* v. *Fitzpatrick*, 36 Md. 619 (1872) (same).

suggested that a "next friend" must have some significant relationship with the real party in interest. *Davis* v. *Austin*, 492 F. Supp. 273, 275–276 (ND Ga. 1980) (minister and first cousin of prisoner denied "next friend" standing). The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court. *Smith*, *supra*, at 1053; *Groseclose ex rel. Harries* v. *Dutton*, 594 F. Supp. 949, 952 (MD Tenn. 1984).

These limitations on the "next friend" doctrine are driven by the recognition that "[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (CA2 1921); see also *Rosenberg* v. *United States*, 346 U. S. 273, 291–292 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel). Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."

Whitmore, of course, does not seek a writ of habeas corpus on behalf of Simmons. He desires to intervene in a state-court proceeding to appeal Simmons' conviction and death sentence. Under these circumstances, there is no federal statute authorizing the participation of "next friends." The Supreme Court of Arkansas recognizes, apparently as a matter of common law, the availability of "next friend" standing in the Arkansas courts, see *Franz* v. *State*, 296 Ark., at 184, 754 S. W. 2d, at 840–841, but declined to grant it to Whitmore. Without deciding whether a "next friend" may ever invoke the jurisdiction of a federal court absent congressional authorization, we think the scope of any federal doctrine of "next friend" standing is no broader than what is

permitted by the habeas corpus statute, which codified the historical practice. And in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability.

That prerequisite for "next friend" standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded. See *Gilmore* v. *Utah*, 429 U. S., at 1017 (STEVENS, J., concurring). Although we are not here faced with the question whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings, such a hearing will obviously bear on whether the defendant is able to proceed on his own behalf. The Supreme Court of Arkansas requires a competency hearing as a matter of state law, and in this case it affirmed the trial court's finding that Simmons had "the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Simmons* v. *State*, 298 Ark., at 194, 766 S. W. 2d, at 423. At oral argument, Whitmore's counsel questioned the validity of the waiver, but we find no reason to disturb the judgment of the Supreme Court of Arkansas on this point.

Simmons was questioned by counsel and the trial court concerning his choice to accept the death sentence, and his answers demonstrate that he appreciated the consequences of that decision. He indicated that he understood several possible grounds for appeal, which had been explained to him by counsel, but informed the court that he was "not seeking any technicalities." Tr. 15. In a psychiatric interview, Simmons stated that he would consider it "'a terrible miscarriage of justice for a person to kill people and not be exe-

cuted,'" *id.*, at 29, and there was no meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision. See *Rees* v. *Peyton*, 384 U. S. 312, 314 (1966). We therefore hold that Whitmore, having failed to establish that Simmons is unable to proceed on his own behalf, does not have standing to proceed as "next friend" of Ronald Gene Simmons.

* * *

At the beginning of this century, the Court confronted a situation similar to this in which a concerned citizen sought to bring an ordinary civil action to secure relief for a condemned man. The Court's response on that occasion is equally apt today: "However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this." *Gusman* v. *Marrero*, 180 U. S. 81, 87 (1901).

Jonas Whitmore lacks standing to proceed in this Court, and the writ of certiorari is dismissed for want of jurisdiction. See *Doremus* v. *Board of Education of Hawthorne*, 342 U. S. 429 (1952).

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court today allows a State to execute a man even though no appellate court has reviewed the validity of his conviction or sentence. In reaching this result, the Court does not address the constitutional claim presented by petitioner: whether a State must provide appellate review in a capital case despite the defendant's desire to waive such review. Rather, it decides that petitioner does not have standing to raise that issue before this Court. The Court rejects petitioner's argument that he should be allowed to pro-

ceed as Ronald Gene Simmons' "next friend," relying on the federal common-law doctrine that a competent defendant's waiver of his right to appeal precludes another person from appealing on his behalf. If petitioner's constitutional claim is meritorious, however, Simmons' execution violates the Eighth Amendment. The Court would thus permit an unconstitutional execution on the basis of a common-law doctrine that the Court has the power to amend.

Given the extraordinary circumstances of this case, then, consideration of whether federal common law precludes Jonas Whitmore's standing as Ronald Simmons' next friend should be informed by a consideration of the merits of Whitmore's claim. For the reasons discussed herein, the Constitution requires that States provide appellate review of capital cases notwithstanding a defendant's desire to waive such review. To prevent Simmons' unconstitutional execution, the Court should relax the common-law restriction on next-friend standing and permit Whitmore to present the merits question on Simmons' behalf. By refusing to address that question, the Court needlessly abdicates its grave responsibility to ensure that no person is wrongly executed. I dissent.

I

This Court has held that the Constitution does not require States to provide appellate review of noncapital criminal cases. *Ross* v. *Moffitt*, 417 U. S. 600, 611 (1974) (citing *McKane* v. *Durston*, 153 U. S. 684, 687 (1894)). It is by now axiomatic, however, that the unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments.

> "Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accord-

> ingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality." *Thompson* v. *Oklahoma*, 487 U. S. 815, 856 (1988) (O'CONNOR, J., concurring in judgment) (citation omitted).

See also *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case'") (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion)); *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake").

This Court has consistently recognized the crucial role of appellate review in ensuring that the death penalty is not imposed arbitrarily or capriciously. In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the Court upheld Georgia's capital sentencing scheme in large part because the statute required appellate review of every death sentence.

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Id.*, at 198 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

See also *id.*, at 211 (WHITE, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment) ("An important aspect of the new Georgia legislative scheme . . . is its provision for appellate review . . . in every case in which the death penalty is imposed"). The provision of automatic appellate review was also a significant factor in the Court's decisions that same Term upholding the capital sentencing schemes of Florida and Texas. See *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (risk of arbitrary or capricious infliction of death penalty "is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted'") (citation omitted); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law"). More recently, in *Zant* v. *Stephens*, *supra*, the Court stressed that its decision to uphold the Georgia death penalty statute "depend[ed] in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." 462 U. S., at 890. Accord, *McCleskey* v. *Kemp*, 481 U. S. 279, 303 (1987). See also *Clemons* v. *Mississippi*, 494 U. S. 738, 749 (1990) ("[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency").

The existence of mandatory appellate review was also a significant factor in the Court's decision upholding California's capital sentencing scheme in *Pulley* v. *Harris*, 465 U. S. 37, 53 (1984). Moreover, although the Court held that the Constitution does not require appellate courts to engage in

proportionality review, it nevertheless acknowledged that *Gregg* "suggested that some form of meaningful appellate review is required." *Id.*, at 45 (citing *Gregg*, *supra*, at 153, 198, 204–206 (joint opinion of Stewart, Powell, and STEVENS, JJ.)). See also *Pulley*, 465 U. S., at 49 ("*Gregg* and *Proffitt* were focused not on proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review"); *id.*, at 54 (STEVENS, J., concurring in part and concurring in judgment) (stating that this Court's precedents establish that "some form of meaningful appellate review is constitutionally required").

Thus, much of this Court's death penalty jurisprudence rests on the recognition that appellate review is a crucial means of promoting reliability and consistency in capital sentencing. The high percentage of capital cases reversed on appeal vividly demonstrates that appellate review is an indispensable safeguard. Since 1983, the Arkansas Supreme Court, on direct review, has reversed in 8 out of 19 cases in which the death penalty had been imposed. See *Robertson* v. *State*, 298 Ark. 131, 137, 765 S. W. 2d 936, 940 (1989) (Hickman, J., concurring); *Fretwell* v. *State*, 289 Ark. 91, 99, 708 S. W. 2d 630, 634–635 (1986) (Hickman, J., concurring). Other States also have remarkably high reversal rates in capital cases. See, *e. g.*, Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1792 (1987) (Florida Supreme Court set aside 47% of death sentences between 1972 and 1984); Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L. J. 97, 144–145, and n. 437 (1979) (Texas Court of Criminal Appeals reversed conviction or invalidated death sentence in 33% of cases between October 1975 and March 1979); *id.*, at 111, and n. 92 (Georgia Supreme Court did same in 30% of capital cases between April 1974 and March 1979). Cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 915 (1983) (MARSHALL, J., dissenting) (between 1976 and 1983, approximately 70% of capital defendants who had been denied federal habeas relief in district courts pre-

vailed in courts of appeals); Greenberg, Capital Punishment as a System, 91 Yale L. J. 908, 918 (1982) (estimating that 60% of convictions or sentences imposed under capital punishment statutes enacted after *Furman* v. *Georgia*, 408 U. S. 238 (1972), were reversed at some point in postconviction appeals process; in contrast, federal criminal judgments in noncapital cases had a reversal rate of 6.5%); U. S. Dept. of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment 1988, p. 1 (July 1989) (116 of 296 death row inmates sent to prison in 1988 had sentences vacated or commuted during that year). These statistics make clear that in the absence of some form of appellate review, an unacceptably high percentage of criminal defendants would be wrongfully executed—"wrongfully" because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State. See Greenberg, *supra*, at 919–922 (listing numerous examples of death row inmates subsequently found to be not guilty and instances of capital convictions and sentences reversed for violations of federal or state law).

Our cases and state courts' experience with capital cases compel the conclusion that the Eighth and Fourteenth Amendments require appellate review of at least death sentences to prevent unjust executions. I believe the Constitution also mandates review of the underlying convictions. The core concern of all our death penalty decisions is that States take steps to ensure to the greatest extent possible that no person is wrongfully executed. A person is just as wrongfully executed when he is innocent of the crime or was improperly convicted as when he was erroneously sentenced to death. States therefore must provide review of both the convictions and sentences in death cases.

II

Appellate review is necessary not only to safeguard a defendant's right not to suffer cruel and unusual punishment

but also to protect society's fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system. See *Gilmore* v. *Utah*, 429 U. S. 1012, 1019 (1976) (MARSHALL, J., dissenting). Because a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review. See *id.*, at 1018 (WHITE, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment"). As the District Court stated so compellingly on review of the habeas petition filed on Simmons' behalf by Reverend Louis Franz and Darrel Wayne Hill: "What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name. It is because of the crying need to vindicate that right, that basic value, that Simmons should be held unable 'to waive resolution in state courts' of the correctness of his death sentence." *Franz* v. *Lockhart*, 700 F. Supp. 1005, 1024 (ED Ark. 1988) (quoting *Gilmore* v. *Utah*, *supra*, at 1018 (WHITE, J., dissenting)) (citation omitted), appeal pending, No. 89–1485EA (CA8). See also, *e. g.*, *Commonwealth* v. *McKenna*, 476 Pa. 428, 441, 383 A. 2d 174, 181 (1978) ("The doctrine of waiver . . . was not . . . designed to block giving effect to a strong public interest, which itself is a jurisprudential concern[, or to] allo[w] a criminal defendant to choose his own sentence. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen") (footnote omitted); *People* v. *Stanworth*, 71 Cal. 2d 820, 834, 457 P. 2d 889, 899 (1969) ("[W]e are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of

this policy to be thwarted through the guise of waiver of a personal right by an individual") (internal quotation marks omitted; citation omitted).

A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice. Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments. Nor could the State knowingly execute an innocent man merely because he refused to present a defense at trial and waived his right to appeal. Similarly, the State may not conduct an execution rendered unconstitutional by the lack of an appeal merely because the defendant agrees to that punishment.

This case thus does not involve a capital defendant's so-called "right to die." When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society—that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation.

Society's overwhelming interest in preventing wrongful executions is evidenced by the fact that almost all of the 37 States with the death penalty apparently have prescribed mandatory, nonwaivable appellate review of at least the sentence in capital cases. U. S. Dept. of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment 1988, p. 5 (July 1989); Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55

Tenn. L. Rev. 95, 113–114 (1987).[1] The Arkansas Supreme Court is the only state high court that has held that a competent capital defendant's waiver of his appeal precludes appellate review entirely. *Franz* v. *State*, 296 Ark. 181, 196–197, 754 S. W. 2d 839, 847 (1988) (Glaze, J., concurring and dissenting). Furthermore, since the reinstitution of capital

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[1] Thirteen States, by statute, rule, or case law, explicitly provide that review of at least the capital sentence will occur with or without the defendant's election or participation. Ala. Code § 12–22–150 (1986); Cal. Penal Code Ann. § 1239(b) (West Supp. 1990); *People* v. *Stanworth*, 71 Cal. 2d 820, 832–834, 457 P. 2d 889, 898–899 (1969); Del. Code Ann., Tit. 11, § 4209(g) (1987); *Goode* v. *State*, 365 So. 2d 381, 384 (Fla. 1978) (construing Fla. Stat. § 921.141(4) (1989)); Ill. Rev. Stat., ch. 110A, ¶ 606(a) (1987); *Judy* v. *State*, 275 Ind. 145, 157–158, 416 N. E. 2d 95, 102 (1981) (construing Ind. Code § 35–50–2–9 (1988)); Mo. Rev. Stat. § 565.035 (1986); Nev. Rev. Stat. § 177.055(2) (1989); *Cole* v. *State*, 101 Nev. 585, 590, 707 P. 2d 545, 548 (1985); N. J. Stat. Ann. § 2C:11–3(e) (West Supp. 1989); *Commonwealth* v. *McKenna*, 476 Pa. 428, 439–440, 383 A. 2d 174, 181 (1978) (construing predecessor statute to 42 Pa. Cons. Stat. § 9711(h) (1988)); Tenn. Code Ann. § 39–2–205 (1982); *State* v. *Holland*, 777 P. 2d 1019, 1022 (Utah 1989) (construing Utah Code Ann. § 77–35–26(10) (Supp. 1989)); see also Utah Code Ann. § 76–3–206(2) (1978); Vt. Rule App. Proc. 3(b). Twenty-two States' statutes or rules employ language indicating that their appellate courts must review at least the sentence in every capital case. Ariz. Rule Crim. Proc. 31.2(b); Colo. Rev. Stat. § 16–11–103(7)(a) (Supp. 1989); Conn. Gen. Stat. § 53a–46b (1985); Ga. Code Ann. § 17–10–35 (1982); Idaho Code § 19–2827 (1987); Ky. Rev. Stat. Ann. § 532.075 (Michie 1985); La. Code Crim. Proc. Ann., Art. 905.9 (West 1984); Md. Ann. Code, Art. 27, § 414 (1987); Miss. Code Ann. § 99–19–105 (Supp. 1989); Mont. Code Ann. § 46–18–307 (1989); Neb. Rev. Stat. § 29–2525 (1989); N. H. Rev. Stat. Ann. § 630.5(vi) (1986); N. M. Stat. Ann. § 31–20A–4 (1987); N. C. Gen. Stat. § 15A.2000(d)(1) (1988); Okla. Stat., Tit. 21, § 701.13 (Supp. 1989); Ore. Rev. Stat. § 163.150(1)(g) (1989); S. C. Code § 16–3–25 (1985); S. D. Codified Laws § 23A–27A–9 (1988); Tex. Crim. Proc. Code Ann. § 37.071(h) (Supp. 1990); Va. Code § 17–110.1 (1988); Wash. Rev. Code § 10.95.100 (1989); Wyo. Stat. § 6–2–103 (1988). Ohio's rule as to waiver is unclear. See Ohio Rev. Code Ann. § 2929.05 (1987). In *State* v. *Brooks*, 25 Ohio St. 3d 144, 495 N. E. 2d 407 (1986), however, both the Ohio Court of Appeals and Ohio Supreme Court reviewed the defendant's death sentence after the State Court of Appeals denied his motion to withdraw his appeal.

punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case. See *Gilmore* v. *Utah*, 429 U. S. 1012 (1976). Following Utah's execution of Gilmore, that State amended its law to provide for mandatory, nonwaivable appellate review. Utah Code Ann. § 77–35–26(10) (Supp. 1989); see also Utah Code Ann. § 76–3–206(2) (1978). The extreme rarity of unreviewed executions in itself suggests the unconstitutionality of such killings. Cf. *Enmund* v. *Florida*, 458 U. S. 782, 788–796 (1982) (finding unconstitutional Florida's death penalty for felony murder in part because only 8 of 36 jurisdictions authorized death for such a crime); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977) (striking down Georgia's provision for death penalty for rape of adult woman in part because Georgia was only State with such a provision).

This Court has recognized in other contexts that societal interests may justify limiting a competent person's ability to waive a constitutional protection. In *Singer* v. *United States*, 380 U. S. 24 (1965), for example, the Court upheld the constitutionality of Federal Rule of Criminal Procedure 23(a), which conditions a defendant's waiver of his right to a jury trial on the approval of the court and the prosecution. The Court reasoned that "[t]he Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." 380 U. S., at 36. Society's interest, expressed in the Eighth Amendment, of ensuring that punishments are neither cruel nor unusual similarly justifies restricting a defendant's ability to acquiesce in the infliction of wrongful punishment. Although death may, to some death row inmates, seem preferable to life in prison, society has the right, and indeed the obligation,

to see that procedural safeguards are observed before the State takes a human life.[2]

III

Given that the Constitution requires mandatory, nonwaivable appellate review, the question remains whether Whitmore may seek relief in this Court on Simmons' behalf. This Court should take whatever measures are necessary, and within its power, to prevent Simmons' illegal execution. The common-law doctrine of next-friend standing provides a mechanism for doing so without exceeding the Article III limitations on our jurisdiction.[3] The Court's refusal to use that mechanism suggests that the Court's desire to eliminate delays in executions exceeds its solicitude for the Eighth Amendment.

As the Court acknowledges, a next friend pursues an action on behalf of the real party in interest. *Ante*, at 163. Simmons obviously satisfies the Article III and prudential standing requirements. The Court therefore does not dispute that Whitmore, standing in for Simmons, would also meet these requirements. The Court refuses to allow Whitmore to act as Simmons' next friend, however, because he has not shown that Simmons "is unable to litigate his own cause due to mental incapacity, lack of access to court, or

[2] Underlying the Court's decision may be the assumption that a competent defendant would never waive his right to appeal unless he was guilty of the crime and deserved to die. See *Franz* v. *Lockhart*, 700 F. Supp. 1005, 1023 (ED Ark. 1988), appeal pending, No. 89–1485EA (CA8). There is no reason to believe, however, that only defendants guilty of the most heinous crimes would choose death over life in prison.

[3] The question whether Whitmore may act as Simmons' next friend in this Court is distinct from the question whether Whitmore could do so in the Arkansas Supreme Court. This Court cannot impose federal standing restrictions, whether derived from Article III or federal common law, on state courts. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 620 (1989); *Department of Labor* v. *Triplett*, 494 U. S. 715, 729 (1990) (MARSHALL, J., concurring in judgment). The Court's holding thus affects only federal courts.

other similar disability." *Ante*, at 165. The Court suggests, without holding, that a party asserting next-friend status must also prove that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," *ante*, at 163, and perhaps, too, that he has "some significant relationship with the real party in interest," *ante*, at 164.[4]

Assuming for the sake of argument that Simmons was competent to forgo petitioning this Court for review[5] and that Whitmore is only minimally interested in Simmons' welfare, I would nevertheless permit Whitmore to proceed as Simmons' next friend. The requirements for next-friend standing are creations of common law, not of the Constitution. *Ante*, at 164–165. Thus, no constitutional considerations impede the Court's deciding this case on the merits.[6] The Court cer-

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[4] Despite the Court's suggestion, I cannot believe that this Court would ever hold that a defendant judged incompetent to waive his right to appeal could be executed without appellate review on the ground that no one with a sufficiently close relation to him had stepped forward to pursue the appeal. Rather, a court would be required to appoint someone to represent such a defendant. See *Franz* v. *Lockhart*, *supra*, at 1011, n. 2. See also Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 Tenn. L. Rev. 95 (1987).

[5] In determining Simmons' competency to waive his right to seek relief in this Court, the majority relies on the Arkansas trial court's finding that Simmons was competent to waive his right to appeal in *state* court. *Ante*, at 165–166. At no point, however, has any court determined that Simmons was competent to waive his right to petition this Court for a writ of certiorari. Legal competency is not static. Given that Simmons' life turns on this question, the Court should at least require a specific determination that he was competent to forgo petitioning this Court before it dismisses this case without reaching the merits.

[6] The Court suggests that some restriction on next-friend standing is necessary to prevent a litigant who asserts only a generalized grievance from circumventing Article III's standing requirements. *Ante*, at 164. But as long as the real party in interest satisfies those standing requirements, as Simmons clearly does, this Court will be presented with an actual case or controversy. If the Court's suggestion were true, it would necessitate abolishing next-friend standing entirely. In terms of Article

tainly has the authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest. Examples of the Court's exercise of that authority pervade our case law. See, *e. g.*, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982) (abandoning subjective element of qualified immunity defense to avoid excessive disruption of government and to permit the resolution of insubstantial claims on summary judgment); *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987) (stating that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action"); *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326–333 (1979) (discarding common-law doctrine of mutuality of parties and authorizing offensive use of collateral estoppel to protect litigants from burden of relitigating issues and to promote judicial economy). See also *Livingston* v. *Jefferson*, 15 F. Cas. 660, 663 (No. 8,411) (CC Va. 1811) (Marshall, C. J., Circuit Judge) (common-law principle is "a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, [and is] susceptible of modification"). In this case, the magnitude of the societal interests at stake justifies relaxing the next-friend requirements to permit Whitmore to challenge Simmons' execution.

Relaxation of those requirements is especially warranted here because judicial consideration of the claim that the Constitution requires appellate review of every capital case would

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III, a next friend who represents the interests of an incompetent person with whom he has a significant relation is no different from a next friend who pursues a claim on behalf of a competent stranger; both rely wholly on the injury to the real party in interest to satisfy constitutional standing requirements.

otherwise be virtually impossible. If a capital defendant desires appellate review, he will undoubtedly obtain that review in state court, see n. 1, *supra*, and, perhaps, in federal court on a petition for habeas corpus. If he waives his right to appeal and is found incompetent, a next friend will be allowed to pursue the appeal, again obviating the need to decide whether the Eighth Amendment requires mandatory, nonwaivable review. Although the fact that a constitutional issue will never be resolved may not justify carving out an exception to Article III's standing requirements, surely that fact, when considered with society's commitment to avoiding wrongful executions, provides ample cause for enlarging the scope of a federal common-law doctrine.

The only purpose the Court invokes for rigidly applying the restrictions on next-friend standing is preventing "'intruders or uninvited meddlers'" from pursuing habeas corpus relief "'as matter of course.'" *Ante*, at 164 (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (CA2 1921)). This purpose, however, does not justify refusing to allow Whitmore to proceed as Simmons' next friend in this Court.[7] First, the Court need not hold that all federal

[7] Appeal to *stare decisis* similarly cannot relieve the Court of responsibility for today's disturbing decision. This case is the first opportunity for this Court to address the next-friend issue raised here with the benefit of full briefing by the parties. Four times the Court was presented with this question in the context of applications for stays of executions filed by parties other than the defendants. Three times the Court denied the applications. See *Gilmore* v. *Utah*, 429 U. S. 1012 (1976); *Evans* v. *Bennett*, 440 U. S. 987 (1979); *Lenhard* v. *Wolff*, 444 U. S. 807 (1979). In *Gilmore*, the Court stated only that the competent defendant had knowingly and intelligently waived any federal rights. 429 U. S., at 1013. In *Evans*, then-JUSTICE REHNQUIST, in his capacity as Circuit Justice, stayed the execution pending consideration by the full Court. 440 U. S. 1301 (1979) (in chambers). The Court then denied the application without opinion, 440 U. S. 987 (1979), with JUSTICE BRENNAN noting in his concurrence that a stay was not necessary because the State had not set an execution date, *ibid.* In *Lenhard*, the Court did not issue an opinion. 444 U. S., at 807. In *Rosenberg* v. *United States*, 346 U. S. 273 (1953), how-

courts must relax restrictions on next-friend standing; the common-law rules could be altered only to the extent this Court deems necessary. If this Court were to hold that Whitmore has standing before it, and then, on the merits, that the Constitution requires some form of nonwaivable appellate review in state court, at least one level of review would be assured for each capital case. Such a decision would obviate the need for relaxing the restrictions in federal district courts and courts of appeals.[8]

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ever, the Court did consider the merits of an application to stay the executions of Julius and Ethel Rosenberg filed by counsel for a man who had no connection to the Rosenbergs and who had not participated in any proceedings related to their case until the stay proceedings in this Court. *Id.*, at 288–289 *(per curiam); id.*, at 291 (Jackson, J., concurring) ("Edelman [the applicant] is a stranger to the Rosenbergs and to their case. His intervention was unauthorized by them and originally opposed by their counsel"). Justice Jackson's concurring opinion stated that the Court "discountenance[d] this practice" of considering an argument not originally pressed by the defendant's own counsel, where those counsel were vigorously contesting the defendants' death sentences. *Id.*, at 292. Far more importantly, however, the Court did not dismiss the application on the ground that the applicant did not satisfy the common-law requirements of next-friend status, but addressed the application on its merits. *Id.*, at 289 *(per curiam).* See also *id.*, at 294 (Clark, J., concurring) ("Human lives are at stake; we need not turn this decision on fine points of procedure or a party's technical standing to claim relief"); *id.*, at 299–300 (Black, J., dissenting) ("I cannot believe . . . that if the sentence of a citizen to death is plainly illegal, this Court would allow that citizen to be executed on the grounds that his lawyers had 'waived' plain error. An illegal execution is no less illegal because a technical ground of 'waiver' is assigned to justify it"); *id.*, at 312 (Douglas, J., dissenting) ("[T]he question of an unlawful sentence is never barred. No man or woman should go to death under an unlawful sentence merely because his lawyer failed to raise the point").

[8] The Court's decision today, which rests on federal common law developed in connection with habeas corpus cases, *ante*, at 164–165, apparently applies to next-friend standing in habeas cases brought in federal district court as well as to petitions for certiorari submitted to this Court. Congress could amend the habeas statute (which provides only that "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his be-*

More fundamentally, however, the interest in preventing a suit by an "uninvited meddler" pales in comparison to society's interest in preventing an illegal execution. When, as here, allowing the "meddler" to press the condemned man's interests is the only means by which the Court can prevent an unconstitutional execution, the Court should sacrifice the common-law restrictions rather than the defendant's life.

IV

The Court today refuses to address a meritorious constitutional claim by rigidly applying a technical common-law rule completely within its power to amend or suspend. It thereby permits States to violate the Constitution by executing willing defendants without requiring minimal assurance that their convictions were correct or their sentences justified. This decision thus continues the Court's unseemly effort to hasten executions at the cost of permitting constitutional violations to go unrectified. See, *e. g.*, *Butler* v. *McKellar*, 494 U. S. 407 (1990); *Teague* v. *Lane*, 489 U. S. 288 (1989). I dissent.

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half," 28 U. S. C. § 2242 (emphasis added)) explicitly to permit next-friend suits in cases of this sort so as to ensure some form of review of capital cases.

NGIRAINGAS ET AL. *v.* SANCHEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–1281. Argued January 8, 1990—Decided April 24, 1990

Petitioners filed suit in the District Court under 42 U. S. C. § 1983 against respondents—the Guam Government, the Guam Police Department and its Director in her official capacity, and various police officers in their official and individual capacities—alleging that petitioners were arrested and assaulted by the officers and forced to write and sign confessions. The District Court dismissed the claims. The Court of Appeals affirmed the dismissal with respect to the government, the police department, and the individual defendants in their official capacities. Analogizing the Government of Guam to an administrative agency, the court ruled that Guam and the police department are no more than federal instrumentalities and thus are not "persons" within the meaning of § 1983, which in its current version relates to "[e]very person who [acts] under color of any statute . . . of any State or Territory." The court also found that the Guam officials could not be sued in their official capacities, because a judgment against them in such capacities would affect the public treasury and the suit essentially would be one against the government itself.

Held: Neither the Territory of Guam nor its officers acting in their official capacities are "persons" under § 1983. Pp. 186–192.

(a) Since § 1983's language affords no clue as to whether "person" includes a Territory, indicia of congressional intent at the time of enactment must be sought. Pp. 186–187.

(b) The omission of Territories from the original version of § 1983 shows that Congress did not mean to subject them to liability. Rather, in 1871, Congress was concerned with Ku Klux Klan activities that were going unpunished in the Southern States and designed § 1983's remedy to combat this evil, recognizing the need for original federal-court jurisdiction as a means to provide at least indirect federal control over the unconstitutional acts of state officials. Territorial courts, in contrast, were under the Federal Government's general control and would not have engendered such immediate concern. Pp. 187–189.

(c) The statute's successive enactments, in context, further reveal the lack of any congressional intent to include Territories as persons. In the 1871 version, persons could not possibly have included Territories, because Territories are not States within the meaning of the Fourteenth

Amendment and could not have been persons acting under color of state law. Cf. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 64. This reading is supported by § 1983's next enactment in 1874, when Congress first added the phrase "or Territory," thus making it possible for a person acting under color of territorial law to be held liable. At the same time, however, Congress pointedly redefined the word "person" in the "Dictionary Act"—which supplied rules of construction for all legislation—to exclude Territories. Pp. 189–192.

(d) Since Guam is not a person, neither are its officers acting in their official capacity. P. 192.

858 F. 2d 1368, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined, and in all but Part II–B of which SCALIA, J., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 193. KENNEDY, J., took no part in the consideration or decision of the case.

Jeffrey R. Siegel argued the cause and filed a brief for petitioners.

Patrick Mason, Deputy Attorney General of Guam, argued the cause for respondents. With him on the brief was *Elizabeth Barrett-Anderson*, Attorney General.

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Shapiro*, and *Paul J. Larkin, Jr.**

JUSTICE BLACKMUN delivered the opinion of the Court.†

In this case we must decide whether a Territory or an officer of the Territory acting in his or her official capacity is a "person" within the meaning of 42 U. S. C. § 1983 (1982 ed.).

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*Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of the Northern Mariana Islands by *Edward Manibusan*, Attorney General, and *David A. Webber*, *Gail B. Geiger*, and *Richard Weil*, Assistant Attorneys General; and for the Government of the Virgin Islands *ex rel.* de Castro by *Godfrey R. de Castro*, Attorney General, *pro se*, *Rosalie Simmonds Ballentine*, Solicitor General, and *Darlene C. Grant* and *Jesse P. Goode*, Assistant Attorneys General.

†JUSTICE SCALIA does not join Part II–B of this opinion.

I

Petitioners Alex Ngiraingas, Oscar Ongklungel, Jimmy Moses, Arthur Mechol, Jonas Ngeheed, and Bolandis Ngiraingas filed suit in the District Court of Guam, alleging numerous constitutional violations and seeking damages under § 1983.[1] The named defendants were the Government of Guam, the Guam Police Department, the Director of the Police Department in her official capacity, and various Guam police officers in their official and individual capacities.

Petitioners were arrested by Guam police on suspicion of having committed narcotics offenses. The complaint, as finally amended, alleged that petitioners were taken to police headquarters in Agana where officers assaulted them and forced them to write and sign statements confessing narcotics crimes.

The District Court dismissed the claims against the Government of Guam and the police department on the ground that Guam was immune from suit under the Organic Act of Guam, 64 Stat. 384, § 3, as amended, 48 U. S. C. § 1421a (1982 ed.), unless Congress or the Guam Legislature waived Guam's immunity. App. to Pet. for Cert. A-4 to A-6. The District Court also dismissed the action against the individual defendants in their official capacities, explaining that because

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[1] Title 42 U. S. C. § 1983 (1982 ed.) reads in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Petitioners also sought damages under 42 U. S. C. §§ 1981, 1985, and 1986 (1982 ed.).

a judgment against the individuals in their official capacities would affect the public treasury, the real party in interest was the Government of Guam. *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 858 F. 2d 1368 (1988) (superseding the opinion at 849 F. 2d 372). Analogizing the government to an admininstrative agency, the court ruled that Guam is "no more than" a federal instrumentality, and thus is not a person within the meaning of § 1983. 858 F. 2d, at 1371–1372. "For the same reasons," the police department, also, is not a person under § 1983. *Id.*, at 1372. Finally, the Court of Appeals ruled that Guam officials may not be sued in their official capacities under § 1983, because a judgment against those defendants in their official capacities would affect the public treasury and the suit essentially would be one against the government itself. *Ibid.*[2] Accordingly, the court affirmed the District Court's dismissal of the claims against the Government of Guam, the Guam Police Department, and the individual defendants in their official capacities.[3]

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[2] Inasmuch as the Court of Appeals held that Guam is not a person for purposes of § 1983, it did not decide whether Guam enjoyed sovereign immunity under the Eleventh Amendment. 858 F. 2d, at 1372, n. 2.

[3] The Court of Appeals ruled that respondent police officers could be sued under § 1983 in their individual capacities to the extent they were not entitled to immunity. The court determined that the police officers were not entitled to immunity from suit in their individual capacities by virtue of § 3 of the Organic Act, as amended, 48 U. S. C. § 1421a (1982 ed.). 858 F. 2d, at 1373. In the court's view, that provision applied only to suits against the Government of Guam and, perhaps, suits against government officers acting in their official capacities. *Ibid.* Nevertheless, the court held that the defendant officers were entitled to invoke qualified immunity under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). The Ninth Circuit therefore reversed the District Court's dismissal of the action against the police officers in their individual capacities and directed the District Court partially to reinstate the complaint and to consider whether the individual officers were entitled to qualified immunity. 858 F. 2d, at 1374.

Because of the importance of the question, and because at least one other Court of Appeals has advanced a different view as to whether a Territory is subject to liability under § 1983,[4] we granted certiorari, 493 U. S. 807 (1989).

II

A

Guam, an island of a little more than 200 square miles located in the west central Pacific, became a United States possession at the conclusion of the Spanish-American War by the Treaty of Paris, Art. II, 30 Stat. 1755. Except for the period from December 1941 to July 1944, when Japan invaded and occupied the island, the United States Navy administered Guam's affairs from 1898 to 1950, when the Organic Act was passed.[5] Among other things, the Act provided for an elected governor and established Guam as an unincorporated Territory. 48 U. S. C. §§ 1421a and 1422 (1982 ed.). It was said at the time that this unincorporated status did not promise eventual statehood. See H. R. Rep. No. 1365, App. No. 3, 81st Cong., 1st Sess., 9 (1949). The United States continues to this day to have a military presence in Guam, with an Air Force base, a Navy communications base, air and weather stations, and a large complex that serves the Seventh Fleet.[6]

To determine whether Guam constitutes a "person" within the meaning of § 1983, we examine the statute's language and purpose. The current version relates to "[e]very person who [acts] under color of any statute . . . of any State or Terri-

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[4] See *Frett* v. *Government of Virgin Islands*, 839 F. 2d 968 (CA3 1988) (Government of Virgin Islands is subject to same liability under § 1983 as any other governmental entity). See also *Fleming* v. *Department of Public Safety, Commonwealth of Northern Mariana Islands*, 837 F. 2d 401 (CA9), cert. denied, 488 U. S. 889 (1988), discussed by the Ninth Circuit in the instant case, 858 F. 2d, at 1371, n. 1.

[5] See A. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 313, 323 (1989).

[6] See Leibowitz, *supra*, at 348.

tory." The statute itself obviously affords no clue as to whether its word "person" includes a Territory. We seek, therefore, indicia of congressional intent at the time the statute was enacted. See *District of Columbia* v. *Carter*, 409 U. S. 418, 425 (1973) (analysis of purposes and scope of § 1983 must "take cognizance of the events and passions of the time at which it was enacted"). See also *United States* v. *Price*, 383 U. S. 787, 803 (1966).

B

Our review of § 1983's history uncovers no sign that Congress was thinking of Territories when it enacted the statute over a century ago in 1871. The historical background shows with stark clarity that Congress was concerned only with events "stateside." "Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. The Act was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Quern* v. *Jordan*, 440 U. S. 332, 354 (1979) (BRENNAN, J., concurring in judgment); see also *Carter*, 409 U. S., at 423 ("[Section] 1983 has its roots in § 1 of the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871"). After the War Between the States, race relations in the Southern States were troubled. The Ku Klux Klan, organized by southern whites, commenced "a wave of murders and assaults . . . against both blacks and Union sympathizers." *Id.*, at 425. Congress was worried "about the insecurity of life and property in the South," and designed § 1 of the Act "primarily in response to the unwillingness or inability of the *state* governments to enforce their own laws against those violating the civil rights of others." *Id.*, at 425–426 (emphasis added).[7] "The debates are replete with references to the

[7] The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871. It said:

"A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these

lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. This report was drawn on by many of the speakers" (footnote omitted). *Monroe* v. *Pape*, 365 U. S. 167, 174 (1961) (overruled in certain other respects by *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978)).

Because Congress was directly concerned with this unrest in the Southern States, it specifically focused on States in the legislation aimed at solving the problem. "As initially enacted, § 1 of the 1871 Act applied only to action under color of the law of any 'State.' 17 Stat. 13."[8] *Carter*, 409 U. S., at 424, n. 11. Persons acting under color of law of any Territory were not included. Viewed against "the events and passions of the time," *id.*, at 425, it is evident that Congress was not concerned with Territories when it enacted the Civil Rights Act of 1871, but was concerned, instead, with the "hundreds of outrages committed . . . through the agency of this Ku Klux organization [that had not been] punished" in the Southern States. Cong. Globe, 42d Cong., 1st Sess., 505 (1871) (remarks of Sen. Pratt). As to Congress' failure to include persons acting under color of law of any Territory,

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evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear." See Cong. Globe, 42d Cong., 1st Sess., 244. See also *Monroe* v. *Pape*, 365 U. S. 167, 172–173 (1961).

[8] The Act of Apr. 20, 1871, § 1, 17 Stat. 13, read:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States . . . ."

"[w]e can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1." *Quern*, 440 U. S., at 343. The omission demonstrates that Congress did not mean to subject Territories to liability under this statute.

Further, the remedy provided by § 1983 was designed to combat the perceived evil. "Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." *Carter*, 409 U. S., at 428. "'The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can: their sympathies are not so nearly identified with those of the vicinage . . . .'" *Ibid.* (quoting Cong. Globe, 42d Cong., 1st Sess., 460 (1871) (remarks of Rep. Coburn)). Because the organization of the judicial system of a Territory was unlike those of the States, it would not have engendered such immediate concern. "Under the organic acts, each territory had three justices appointed by the president for four-year terms. Sitting together, they constituted a supreme court; sitting separately, they acted as district judges. In both capacities they had jurisdiction over cases arising under United States or territorial law." E. Pomeroy, The Territories and the United States 1861–1890, Studies in Colonial Administration 51 (1947). Thus, unlike the state courts, over which the Federal Government had no control, the territorial courts were created by Acts of Congress, with judges appointed by the President, and were under the general control of the Federal Government.

C

Finally, the successive enactments of the statute, in context, further reveal the lack of any intent on the part of Congress to include Territories as persons. In 1871, the Act exposed to liability "any person [acting] under color of any law . . . of any State." Act of Apr. 20, 1871, § 1, 17 Stat. 13.

Such persons in the 1871 Act could not possibly have included a Territory because "Territories are not 'States' within the meaning of the Fourteenth Amendment," and a Territory could not have been a "person [acting] under color of" any state law. *Carter*, 409 U. S., at 424, n. 11. Any attempt to interpret "person" as including a "Territory" would be too strained a reading of the statute and would lead to a far more "awkward" interpretation than what a majority of the Court found significant in *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 64 (1989) (to read § 1983 as saying that "'every person including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . .'" would be "a decidedly awkward way of expressing an intent to subject the States to liability").

This reading of the original statute is supported by its next enactment. In 1874, the phrase "or Territory" was added to § 1, without explanation, in the 1874 codification and revision of the United States Statutes at Large. Rev. Stat. § 1979. See *Carter*, 409 U. S., at 424, n. 11. But while the 1874 amendment exposed to liability "[e]very person [acting] under color of any [law] . . . of any . . . Territory," it did not expose a Territory itself to liability. In the same revision that added "Territory" to § 1, Congress amended § 2 of the Act of Feb. 25, 1871, 16 Stat. 431 (the "Dictionary Act"), "which supplied rules of construction for all legislation." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 719 (REHNQUIST, J., dissenting); see also *Will*, 491 U. S., at 78 (BRENNAN, J., dissenting). In 1871, § 2 of the Dictionary Act defined "person" as including "bodies politic and corporate."[9] The 1874 recodification omitted those three words and substituted "partnerships and corpora-

[9] "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . ." 16 Stat. 431.

tions."[10] It is significant that at the time Congress added "Territory" to § 1983, so that a person acting under color of territorial law could be liable under the statute, Congress clarified the definition of those whose actions could give rise to § 1983 liability. Most significant is the asserted reason for doing so:

> "The reasons for the latter change [substituting 'partnerships and corporations' for 'bodies politic and corporate'] are that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, and should be understood to include a government, such as a State, while 'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded." 1 Revision of the United States Statutes as Drafted 19 (1872).

As these comments make clear, at the time Congress first made it possible for a person acting under color of territorial law to be held liable, the very same Congress pointedly redefined the word "person" to make it clear that a Territory would not be included.[11] It is evident that Congress did not

[10] "In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, . . . the word 'person' may extend and be applied to partnerships and corporations . . . ." Rev. Stat. § 1. Because the words "or Territory" were added in the very "revised statutes" to which the language in the Dictionary Act refers, we conclude that the amended definition of "person" is the definition to which we look in determining whether a Territory is included in that definition.

[11] This reasoning is fully consistent with the Court's decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). There the Court held that a municipality could be a "person [acting] under color of any law . . . of any State," Act of Apr. 20, 1871, § 1, 17 Stat. 13, and thus

intend to encompass a Territory among those "persons" who could be exposed to § 1983 liability. "Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, *United States* v. *Price*, 383 U. S., at 801, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it." *Carter*, 409 U. S., at 432.

In conclusion, when we examine the confluence of § 1983's language, its purpose, and its successive enactments, together with the fact that Congress has defined "person" to exclude Territories, it becomes clear that Congress did not intend to include Territories as persons who would be liable under § 1983.

Petitioners concede, Brief for Petitioners 4, 50, and we agree, that if Guam is not a person, neither are its officers acting in their official capacity.

We hold that neither the Territory of Guam nor its officers acting in their official capacities are "persons" under § 1983.[12] The judgment of the Court of Appeals is affirmed.

It is so ordered.

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was exposed to liability under the 1871 statute. In concluding that the 1871 Congress specifically intended to subject municipalities to § 1983 liability, we relied, among other things, on indications in the legislative history that municipal liability was contemplated, on the general treatment of corporations (including municipal corporations) as "persons," and on the 1871 version of the Dictionary Act. 436 U. S., at 686–689. As has been explained, the 1871 Congress had no similar intent with respect to Territories, and when it did address Territories in 1874, Congress intended not to subject them to liability. The 1874 revisions of the Dictionary Act, however, must be considered in light of the previously and more specifically expressed intent to subject municipalities to liability.

More recently, there have been at least two attempts in Congress to amend § 1983 to include States and Territories within the meaning of persons. The bills did not leave Committee. See Sagafi-Nejad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 St. Louis U. L. J. 373, 374, 376, n. 21 (1983).

[12] This conclusion makes it unnecessary to consider Guam's claim of immunity under the Eleventh Amendment.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court holds that neither a Territory nor an officer of the Territory acting in his or her official capacity is a "person" within the meaning of § 1983.[1] I believe that the opposite conclusion is compelled by the history, legislative and otherwise, surrounding the passage of § 1983 and by the absence of any immunity on the part of Territories from congressional enactments. Therefore, I respectfully dissent.

I

The Court's determination that "Congress did not intend to include Territories as persons who would be liable under § 1983," *ante*, at 192, rests primarily on its conclusion that "review of § 1983's history uncovers no sign that Congress was thinking of Territories when it enacted the statute over a century ago in 1871." *Ante*, at 187. The Court's review, however, is incomplete. Our decision in *District of Columbia* v. *Carter*, 409 U. S. 418 (1973), set forth ample evidence that Congress had the Territories in mind when it enacted the predecessor of § 1983, the Civil Rights Act of 1871. *Carter* held that the District of Columbia is not a "State or Territory" for purposes of § 1983:

> "[S]ince the District is itself the seat of the National Government, Congress was in a position to observe and, to a

[1] Title 42 U. S. C. § 1983 (1982 ed.) provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

> large extent, supervise the activities of local officials. Thus, the rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to federal officials—the assumption that the Federal Government could keep its own officers under control—is equally applicable to the situation then existing in the District of Columbia." *Id.*, at 429–430 (footnote omitted).

We noted, however, that the situation in the other Territories was dramatically different. While acknowledging that, as a legal matter, "Congress also possessed plenary power over the Territories," *id.*, at 430, we noted that "[f]or practical reasons, however, effective federal control over the activities of territorial officials was virtually impossible." *Ibid.* We explained:

> "'[T]he territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States.'" *Id.*, at 430–431, quoting *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 546 (1962) (opinion of Harlan, J.).

We also noted, contrary to the Court's implication today, see *ante*, at 189, that because territorial judges were appointed to a term of only four years, they "were peculiarly susceptible to local pressures, since their reappointments were often dependent upon favorable recommendations of the territorial legislatures." *Carter*, *supra*, at 431, n. 28; see also L. Friedman, A History of American Law 142 (1973) (noting the corruption common among territorial judges); E. Pomeroy, The Territories and the United States 1861–1890, Studies in Colonial Administration 52–56 (1947) (same). We concluded

that "although the Constitution vested control over the Territories in the Congress, its practical control was both 'confused and ineffective,' making the problem of enforcement of civil rights in the Territories more similar to the problem as it existed in the States than in the District of Columbia." *Carter, supra,* at 431 (footnote omitted), quoting E. Pomeroy, *supra,* at 4; see also *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U. S. 572, 596 (1976) ("Congress . . . lacked effective control over actions taken by territorial officials, although its authority to govern was plenary").

Our recognition in *Carter* that Congress was concerned with the protection of civil rights in the Territories when it fashioned the scope of § 1983 is fully supported by the historical events surrounding the statute's enactment. In the years preceding the passage of the Civil Rights Act of 1871, turmoil and racially motivated violence in the Territories focused Congress' attention on the need for federal protection of basic civil rights there. The Territories, of course, had been a principal source of friction between the North and the South before the Civil War.[2] The idea of "squatter sovereignty," advanced by Stephen A. Douglas of Illinois and enshrined in the Compromise of 1850, allowed citizens of each Territory to decide for themselves whether they would join the Union as citizens of a slave or free State. The Compromise of 1850 provided that the admissions of Utah and New Mexico were to be governed by "squatter sovereignty," and

[2] The 1820 Missouri Compromise established that Territories would be admitted to statehood in pairs, one slave and one free, and that slavery was forever to be prohibited in that part of the Louisiana Purchase north of the southern boundary of Missouri (36° 30′). Following this pattern, in 1837 Arkansas and Michigan were admitted as a slave and free State, respectively. In 1845, Florida from the South and, in 1846, Iowa from the Northwest became States. Texas entered the Union as a slave State in 1845 and California as a free State in 1850. Thereafter, balance was impossible: Minnesota in 1858 and Oregon in 1859 were both admitted as free States.

the Kansas-Nebraska Act of 1854 extended the principle to those Territories as well. The resulting disputes within the Territories between abolitionist and proslavery groups gave rise to rampant acts of violence, the best illustration of which has come to be known as "bleeding Kansas."

In the 1855 elections for the Kansas Territorial Legislature, several thousand "border ruffians" crossed over from Missouri to stuff ballot boxes and ensure the election of a legislature that would, and did, pass a drastic slave code. See S. Morison, H. Commager, & W. Leuchtenburg, A Concise History of the American Republic 260 (2d ed. 1983). The free-state forces in Kansas responded by setting up their own rump government, and "by 1856 Kansas had two governments, both illegal." *Ibid.* What followed was a "savage conflict" between the two sides. *Ibid.* "Into Kansas thronged Southern and Northern zealots, brawlers, adventurers, and land jobbers. From New England, financed by Boston money, moved Abolitionist immigrants who were led by their ministers but who also brought their rifles with them." L. Hacker, The Shaping of the American Tradition 468 (1947). Public buildings were burned, and supporters of each side were murdered. In retaliation for the slaying of two Abolitionists, John Brown killed five proslavery men at Osawatomie Creek. In sum, in what "might almost be regarded as the opening battle of the civil war," 1 J. Blaine, Twenty Years of Congress: From Lincoln to Garfield 121 (1884), law and order broke down completely.

This and other examples of turbulence in the Territories[3] were very much on Congress' mind when it enacted the Civil Rights Act of 1871. Congress would not have discussed the Territories so often in its deliberations unless it intended the Act to apply there. Proponents of the measure stressed

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[3] See, *e. g.*, E. Pomeroy, The Territories and the United States 1861–1890, Studies in Colonial Administration 107 (1947) ("'A State signifies law and order, . . . a Territory violence and disorder'"), quoting the Colorado Springs Gazette, June 10, 1876.

the important role the Federal Government had played in curbing the prewar spread of slavery in the Territories. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 335 (1871) (remarks of Rep. Hoar) ("[T]he great Northwest was saved from slavery by the national power. . . . If it had not been for the benignant interposition of the national authority against the local desire to establish despotism, those great States of Illinois, Indiana, Ohio, Michigan, and Wisconsin would have been to-day slave-holding States"). Some legislators drew an explicit linkage between the Civil Rights Act and violence in the Territories, characterizing opponents of the legislation as "[t]he same men [who] were wont to ridicule 'bleeding Kansas.'" *Id.*, at 414 (remarks of Rep. Roberts). Others emphasized the importance of extending to "every individual citizen of the Republic in every State *and Territory* of the Union . . . the extent of the rights guarantied to him by the Constitution." See *id.*, at App. 81 (remarks of Rep. Bingham) (emphasis added); see also *id.*, at App. 86 (remarks of Rep. Bingham) (referring to "justice for all . . . on the frontiers of your widely extended domain").[4] The Civil Rights Act was intended "to protect and defend and give remedies for their wrongs to *all* the people" and thus to be "liberally and beneficently construed." *Id.*, at App. 68 (remarks of Rep. Shellabarger) (emphasis added). In sum, Congress contemplated that the Civil Rights Act of 1871 would extend to the Territories.

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[4] Critics of the proposal were quick to point out that "th[e] bill applie[d] to the punishment of offenses in all the country," and that the type of "offenses of a mob character" at which § 1983 was directed were "by no means confined to the South, but [also extended] to the North and West, where undetected and unprincipled perpetrators of crimes, both singly and in couples, or in larger numbers, ha[d] a remarkable ingenuity in their dark and criminal transactions." Cong. Globe, 42d Cong., 1st Sess., 416 (1871) (remarks of Rep. Biggs) (also discussing the possibility that the Mormons in Utah, then a Territory, would be liable under the Civil Rights Act for their actions because they were in "a standing state of insurrection against fundamental principles of public policy, if not of law").

This conclusion is bolstered by the fact that in 1867 Congress had extended suffrage to all adult males in the Territories, including Afro-Americans, at a time when the States were still permitted to deny the right to vote on account of race.[5] See Cong. Globe, 39th Cong., 1st Sess. 2600–2602 (1866). The organic Acts establishing territorial governments were amended to provide:

> "[T]here shall be no denial of the elective franchise in any of the Territories of the United States, now, or hereafter to be organized, to any citizen thereof, on account of race, color, or previous condition of servitude; and all acts or parts of acts, either of Congress or the Legislative Assemblies of said Territories, inconsistent with the provisions of this act, are hereby declared null and void." 14 Stat. 379 (1867).

See also E. McPherson, The Political History of the United States of America During the Period of Reconstruction 184 (1871); E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 272 (1988). In 1874, Congress passed legislation to ensure that every Territory's organic Act included the protections of the Constitution and civil rights embodied in other federal laws. See Rev. Stat. § 1891 (1874).

The extension of these basic federal rights and the recognition of the concomitant need for federal enforcement[6] dem-

[5] The Fifteenth Amendment prohibiting racial discrimination in suffrage was not ratified until 1870.

[6] See, *e. g.*, Cong. Globe, 39th Cong., 2d Sess., 452 (1867) (remarks of Rep. Dawes) ("[N]ever in the history of territorial governments have the rights of the citizen, without distinction of race or color, been so guarant[eed] and protected, . . . as they are at this hour in [the Territory of Colorado and the Territory of Nebraska]. The civil rights bill, which is above any territorial legislation or any adverse judicial decision in a Territory where our power is supreme, has guarantied to him beyond peril every civil right known under the Constitution of the United States . . . so that every citizen of the United States, be he high or be he low, be he white or be he black, of whatsoever name or nation or color or clime, to-day in the

onstrate that Congress intended Territories to be considered "persons" for purposes of § 1983. Of course, the specific reference to "Territory" in § 1983's predecessor was not added until 1874, some three years after the initial passage of the Civil Rights Act. But this is of no moment. Although there is no legislative history to explain the addition,[7] see *Carter*, 409 U. S., at 424, n. 11, we have noted that "[t]he evident aim was to insure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and laws of the United States." *Flores de Otero*, 426 U. S., at 582–583. Congress' overriding concern lay in providing strong remedies for civil rights violations in the Territories. Because few measures are more effective than suing the government directly for damages, see *Owen* v. *City of Independence*, 445 U. S. 622, 650–656 (1980); *Quern* v. *Jordan*, 440 U. S. 332, 357–365 (1979) (BRENNAN, J., concurring in judgment), I believe that Congress intended a Territory to fall within the class of "persons" potentially liable under § 1983.

The majority urges that this construction would create a somewhat "awkward" interpretation of the statute, *ante*, at 190, since Territories by definition act "under color of" their own laws. I do not find this awkwardness determinative, however, because § 1983 also extends to *natural persons* who act under color of territorial law. The under-color-of-law requirement serves to ensure that not every act of these natural persons in their private capacities gives rise to § 1983 liability. The only method of avoiding the redundancy of which the majority complains would have been to replace the

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Territory of Nebraska enjoys, beyond the power of local laws or adverse judicial decisions, every right, civil or political, known under the Constitution of the United States").

[7] The absence of fanfare surrounding the 1874 amendment suggests that the amendment was perceived as a technical correction that did not alter the statute's intended meaning, bolstering the conclusion that Congress had meant to include Territories all along.

catchall term "persons" with a detailed list of each separate category of possible defendants. That approach would have been even more "awkward" than the one ultimately chosen by Congress. In any event, I thought that we enforced the statutes drafted by Congress whether or not they flowed "trippingly on the tongue."

Neither is my conclusion that Territories are "persons" under § 1983 undermined by the 1874 recodification of the Dictionary Act, which altered the definition of "person" by replacing the phrase "bodies politic and corporate" with "partnerships and corporations." 1 Revision of the United States Statutes as Drafted 19 (1872) (hereinafter Draft). The Court suggests that Congress clarified the definition of "person" in the Dictionary Act to exclude Territories even while at the same time making clear that § 1983 covered civil rights abuses in the Territories. See *ante*, at 189–192. The notion that Congress would have moved simultaneously in such contrary directions is implausible. At any rate, there is little authoritative support for the Court's view, since the recodification of the Dictionary Act was accompanied not by legislative history from Congress itself but only by comments from commissioners appointed to revise the United States Code. See *ante*, at 190–191 (citing the remarks of the commissioners). "Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley* v. *United States*, 490 U. S. 545, 554 (1989), quoting *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199 (1912). The revision of the Dictionary Act surely does not evince a clear intent to change the scope of § 1983. To the contrary, the preface to the revision explains that the definitions supplied are merely presumptive in the sense that "the provisions of this Title are peculiarly provisional and experimental. They are put forward as questions, not as decisions. They are to guide in commencing the task of revision, and are in turn to

be revised and developed as that task proceeds." 1 Draft, at 1. I do not think that Congress would have undertaken so tentatively the substantial alterations described by the majority.

Even were I to accept the Court's premise that whether Territories are "persons" for purposes of § 1983 must be analyzed in light of the 1874 recodification of the Dictionary Act, I would reach the same conclusion. Although the recodification eliminated the reference to "body politic," this change did not exclude Territories from the scope of § 1983 because the recodification also provided that "the word 'person' may extend and be applied to partnerships and *corporations*," *id.*, at 19 (emphasis added). At the time of the revision the term "corporation" generally was thought to include political entities such as a Territory. See Cong. Globe, 39th Cong., 2d Sess., 451 (1867) (remarks of Rep. Bingham) (referring to the Territory of Nebraska as "a corporation"). "The word 'corporations,' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendant is in this sense 'a corporation.'" *Chisholm* v. *Georgia*, 2 Dall. 419, 447 (1793) (Iredell, J.).[8] A Territory thus would

[8] At common law, a "corporation" was an "artificial perso[n] endowed with the legal capacity of perpetual succession" consisting either of a single individual (termed a "corporation sole") or of a collection of several individuals (a "corporation aggregate"). 3 H. Stephen, Commentaries on the Laws of England 166, 168 (1st Am. ed. 1845). The sovereign was considered a corporation. See *id.*, at 170; see also 1 W. Blackstone, Commentaries *467. Under the definitions supplied by contemporary law dictionaries, Territories would have been classified as "corporations" (and hence as "persons") at the time that § 1983 was enacted and the Dictionary Act recodified. See W. Anderson, A Dictionary of Law 261 (1893) ("All corporations were originally modeled upon a state or nation"); 1 J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America 318–319 (11th ed. 1866) ("In this extensive sense the United States may be termed a corporation"); *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154 (1886) ("'The United States is a . . . great corporation . . . ordained and established by the American people'") (quoting *United*

qualify as a "person" even under the 1874 recodification of the Dictionary Act.

II

Respondents argue that any congressional intent to subject Territories to liability as "persons" under § 1983 is belied by our previous conclusion that "in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Will* v. *Michigan Department of State Police*, 491 U. S. 58, 66–67 (1989); see also *Quern* v. *Jordan*, 440 U. S., at 341–343. Respondents note that in *Will*, we relied heavily on such a rule of construction in holding that States are not "persons" within the meaning of § 1983. We reasoned that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration," because "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the Federal-State balance in that respect." 491 U. S., at 66.

The concerns animating this rule of interpretation, however, are absent here because Territories have never possessed the type of immunity thought to be enjoyed by States. The Eleventh Amendment does not of its own force apply to the Territories, and the Organic Act of Guam, 64 Stat. 384 (codified at 48 U. S. C. § 1421 *et seq.* (1982 ed.)), which makes applicable to Guam numerous specific sections of the Constitution and Bill of Rights, expressly *does not* confer Eleventh Amendment immunity on the Territory. See 48 U. S. C. § 1421b(u) (1982 ed.).[9] Even if the Eleventh

States v. *Maurice*, 26 F. Cas. 1211, 1216 (No. 15,747) (CC Va. 1823) (Marshall, C. J.)); *Cotton* v. *United States*, 11 How. 229, 231 (1851) (United States is "a corporation"). See generally *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 561–562 (1819) (explaining history of term "corporation").

[9] The Organic Act of Guam, enacted in 1950, established that the Government of Guam "shall have power to sue" under its own name. See § 1421a. The Organic Act originally was silent concerning the Territory's

Amendment reflects a common-law principle of state sovereign immunity against actions in federal court—a view I do not accept, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 258–302 (1985) (BRENNAN, J., dissenting)—the Constitution certainly does not embody such a form of common-law immunity applicable to *Territories*.

The plenary nature of federal authority over the Territories dispels any suggestion that they may assert a common-law immunity against a federal claim in a federal court. The Territories Clause provides without qualification that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, §3, cl. 2. An unincorporated Territory "exists at the behest of Congress. By a simple vote of the Congress, the Organic Act under which the unincorporated territory exists may be repealed and the limited self government which it

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ability to be sued. In 1959, Congress amended the Organic Act to provide that the government, "with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers." *Ibid.* Respondents contend that the 1959 amendment provides the only exceptions to an otherwise universally applicable sovereign immunity bestowed by the Organic Act itself.

I disagree. The limited authorization for legislative waiver of sovereign immunity refers solely to claims arising under territorial law. The scheme is therefore fully consistent with the understanding that the 1950 Act granted Guam *only* immunity from suit in its own courts for violations of its own law. The immunity conferred by the 1950 Act corresponded to the common-law notion of sovereign immunity. See *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907). In 1959, Congress carved out a potential waiver of some of that immunity, but nowhere in either law did Congress suggest that it intended Guam to be immune from suit in federal court under federal law. See H. R. Rep. No. 214, 86th Cong., 1st Sess., 1–3 (1959); S. Rep. No. 969, 86th Cong., 1st Sess., 1–3 (1959); H. R. Rep. No. 1677, 81st Cong., 2d Sess., 12 (1950); S. Rep. No. 2109, 81st Cong., 2d Sess., 13 (1950).

enjoys nullified." Brief for Government of Virgin Islands as *Amicus Curiae* 8.[10] "The Government of a State does not derive its powers from the United States, while the Government of [a Territory] owes its existence wholly to the United States. . . . The jurisdiction and authority of the United States over that [T]erritory and its inhabitants, for all legitimate purposes of government, is paramount." *Grafton* v. *United States*, 206 U. S. 333, 354 (1907). Congress has "entire dominion and sovereignty" and "full legislative power" over the Territories. *Simms* v. *Simms*, 175 U. S. 162, 168 (1899); see also *Binns* v. *United States*, 194 U. S. 486, 491 (1904); *Late Corp. of Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, 42–43, 45 (1890). "[Congress] may make a void Act of the territorial government valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments." *National Bank* v. *County of Yankton*, 101 U. S. 129, 133 (1880); see also *Sere* v. *Pitot*, 6 Cranch 332, 336–337 (1810); *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 542–543 (1828). Whatever limits the Constitution imposes on the exercise of federal power in the Territories, see *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 268–269

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[10] Congressional supremacy, however, does not support the Court of Appeals' conclusion that Guam is outside the coverage of § 1983 because it is an instrumentality of the Federal Government. Under the Court of Appeals' approach, even a natural person acting under color of Guam law would be beyond the scope of § 1983—a result flatly inconsistent with any view of the statute. See *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 582–584 (1976) (referring to the availability of § 1983 actions against persons "acting under color of territorial law"). I read the majority opinion today as rejecting the Court of Appeals' analysis. See also, *e. g.*, House Committee on Interior and Insular Affairs, Report of the Commission on the Application of Federal Laws to Guam, H. R. Doc. No. 212, 82d Cong., 1st Sess., 15 (1951) (listing 42 U. S. C. § 1983, then codified at 8 U. S. C. § 43 (1946 ed.), as among the statutes of the United States applicable to Guam).

(1990) (discussing the Insular Cases), sovereign immunity is not one of them.

We have recognized the concept of sovereign immunity "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907). Our understanding of common-law sovereign immunity does not protect against liability under the laws of a superior governmental authority. See *Owen* v. *City of Independence*, 445 U. S., at 647–648, and n. 30. In addition, while the concept of immunity may afford a sovereign protection from suit "in its own courts without its consent, . . . it affords no support for a claim of immunity in another sovereign's courts." *Nevada* v. *Hall*, 440 U. S. 410, 416 (1979). These principles lead ineluctably to the conclusion that although a Territory may retain common-law sovereign immunity against claims raised in its own courts under its own *local* laws, see *Puerto Rico* v. *Shell Co. (P. R.)*, 302 U. S. 253, 262, 264 (1937); *Porto Rico* v. *Rosaly*, 227 U. S. 270, 273–274 (1913); *Kawananakoa*, *supra*, at 353–354, a Territory, particularly an unincorporated Territory such as Guam that is not destined for statehood, see *Rosaly*, *supra*, at 274, can have no immunity against a claim like the one here—a suit in federal court based on federal law.[11]

The Court in *Will* reasoned that Congress would not have abrogated state sovereign immunity, exemplified by the Eleventh Amendment, without a clearer statement of its intent to do so; today, the Court finds that a Territory lacking such sovereign immunity, either under the common law or by congressional grace, is not a "person" either. These conclusions are in tension. To the extent that our decision in *Will*

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[11] Cases cited by respondents as evidence of territorial immunity, such as *Wisconsin* v. *Doty*, 1 Wis. 396, 407 (1844); *Langford* v. *King*, 1 Mont. 33, 38 (1868); *Beachy* v. *Lamkin*, 1 Idaho 50, 52 (1866); *Fisk* v. *Cuthbert*, 2 Mont. 593, 598 (1877), are irrelevant because they involve claims asserted under *territorial* rather than *federal* law.

reasoned that States are not "persons" within the meaning of § 1983 because Congress *presumably* would not have abrogated state sovereign immunity without a clear statement of its intent to do so, the *opposite* presumption should control this case: Because Congress has such plenary legal authority over a Territory's affairs and because a Territory can assert no immunity against the laws of Congress (except insofar as Congress itself grants immunity), we ought to *presume* that Territories are "persons" for purposes of § 1983.

I would hold that both Territories and territorial officers acting in their official capacities are "persons" within the meaning of § 1983 and that Guam has no sovereign immunity from suits in federal court under federal law. I therefore respectfully dissent.

STEWART ET AL. *v.* ABEND, DBA AUTHORS RESEARCH CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–2102. Argued January 9, 1990—Decided April 24, 1990

In 1945, author Cornell Woolrich agreed to assign the motion picture rights to several of his stories, including the one at issue, to petitioners' predecessor in interest. He also agreed to renew the copyrights in the stories at the appropriate time and to assign the same motion picture rights to the predecessor in interest for the 28-year renewal term provided by the Copyright Act of 1909. The film version of the story in question was produced and distributed in 1954. Woolrich died in 1968 without a surviving spouse or child and before he could obtain the rights in the renewal term for petitioners as promised. In 1969, his executor renewed the copyright in the story and assigned the renewal rights to respondent Abend. Apparently in reliance on *Rohauer* v. *Killiam Shows, Inc.*, 551 F. 2d 484 (CA2)—which held that the owner of the copyright in a derivative work may continue to use the existing derivative work according to the original grant from the author of the pre-existing work even if the grant of rights in the pre-existing work lapsed—petitioners subsequently re-released and publicly exhibited the film. Abend filed suit, alleging, among other things, that the re-release infringed his copyright in the story because petitioners' right to use the story during the renewal term lapsed when Woolrich died. The District Court granted petitioners' motions for summary judgment based on *Rohauer* and the "fair use" defense. The Court of Appeals reversed, rejecting the reasoning of *Rohauer*. Relying on *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373—which held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues—the court concluded that petitioners received from Woolrich only an expectancy in the renewal rights that never matured, and that his executor, as his statutory successor, was entitled to renew the copyright and to assign it to Abend. The court also determined that petitioners' use of Woolrich's story in their film was not fair use.

Held:

1. The distribution and publication of a derivative work during the copyright renewal term of a pre-existing work incorporated into the de-

rivative work infringes the rights of the owner of the pre-existing work where the author of that work agreed to assign the rights in the renewal term to the derivative work's owner but died before the commencement of the renewal period and the statutory successor does not assign the right to use the pre-existing work to the owner of the derivative work. Pp. 216–236.

(a) The renewal provisions of the 1909 and 1976 Copyright Acts, their legislative history, and the case law interpreting them establish that they were intended both to give the author a second chance to obtain fair remuneration for his creative efforts and to provide his family, or his executors absent surviving family, with a "new estate" if he died before the renewal period arrived. Under *Miller Music*, although the author may assign all of his exclusive rights in the copyrighted work by assigning the renewal copyright without limitation, the assignee holds nothing if the author dies before commencement of the renewal period. This being the rule with respect to *all* of the renewal rights, it follows, *a fortiori*, that assignees such as petitioners of the right to produce a derivative work or some other portion of the renewal rights also hold nothing but an unfulfilled and unenforceable expectancy if the author dies before the renewal period, unless the assignees secure a transfer of the renewal rights from the author's statutory successor. Pp. 216–221.

(b) Petitioners' contention that any right the owner of rights in the pre-existing work might have had to sue for infringement that occurs during the renewal term is extinguished by creation of the new work is not supported by any express provision of the Act nor by the rationale as to the scope of protection achieved in a derivative work, and is contrary to the axiomatic principle that a person may exploit only such copyrighted literary material as he either owns or is licensed to use. Section 6 of the 1909 Act, 17 U. S. C. § 7 (1976 ed.), and 17 U. S. C. § 103(b) (1988 ed.), as set forth in the 1976 Act, made explicit the well-settled rule that the owner of a derivative work receives copyright protection only for the material contributed by him and to the extent he has obtained a grant of rights in the pre-existing work. Pp. 221–224.

(c) Nor is petitioners' position supported by the termination provisions of the 1976 Act, which, for works existing in their original or renewal terms as of January 1, 1978, empowered the author to gain an additional 19 years' copyright protection by terminating any grant of rights at the end of the renewal term, except, under 17 U. S. C. § 304(c)(6)(A) (1988 ed.), the right to use a derivative work for which the owner of the derivative work has held valid rights in the original and renewal terms. No overarching policy preventing authors of pre-existing works from blocking distribution of derivative works may be inferred from § 304(c)(6)(A), which was part of a compromise between competing special inter-

ests. In fact, the plain language of the section indicates that Congress assumed that the owner of the pre-existing work continued to possess the right to sue for infringement even after incorporation of that work into the derivative work, since, otherwise, Congress would not have explicitly withdrawn the right to terminate use rights in the limited circumstances contemplated by the section. Pp. 224–227.

(d) Thus, the *Rohauer* theory is supported by neither the 1909 nor the 1976 Act. Even if it were, however, the "rule" of that case would make little sense when applied across the derivative works spectrum. For example, although the contribution by the derivative author of a condensed book might be little as compared to that of the original author, publication of the book would not infringe the pre-existing work under the *Rohauer* "rule" even though the derivative author has no license or grant of rights in the pre-existing work. In fact, the *Rohauer* "rule" is considered to be an interest-balancing approach. Pp. 227–228.

(e) Petitioners' contention that the rule applied here will undermine the Copyright Act's policy of ensuring the dissemination of creative works is better addressed by Congress than the courts. In attempting to fulfill its constitutional mandate to "secur[e] for limited Times to Authors . . . the exclusive Right to their Respective Writings," Congress has created a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished when his work is incorporated into another work, it is not the role of this Court to alter the delicate balance Congress has labored to achieve. Pp. 228–230.

(f) Section 6 of the 1909 Act, 17 U. S. C. § 7 (1976 ed.)—which provides that derivative works when produced with the consent of the copyright proprietor of the pre-existing work "shall be regarded as new works subject to copyright . . . ; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed . . . ," or be construed to affect the copyright status of the original work—does not, as the dissent contends, give the original author the power to sell the rights to make a derivative work that upon creation and copyright would be completely independent of the original work. This assertion is derived from three erroneous premises. First, since the plain meaning of the "force or validity" clause is that the copyright in the "matter employed"—*i. e.*, the pre-existing work when it is incorporated into the derivative work—is not abrogated by publication of the derivative work, the dissent misreads § 7 when it asserts that only the copyright in the "original work" survives the author's conveyance of derivative rights. Second, the substitution of "publication" for "copy-

right" in the final version of the force or validity clause does not, as the dissent contends, establish that it was the publication of the derivative work, and not the copyright, that was not to "affect . . . any subsisting copyright." Since publication of a work without proper notice sent it into the public domain under the 1909 Act, the language change was necessary to ensure that the publication of a derivative work without proper notice, including smaller portions that had not been previously published and separately copyrighted, would not result in those sections moving into the public domain. Third, the dissent errs in interpreting § 3 of the 1909 Act—which provides that a copyright protects all copyrightable component parts of a work and "all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright"—as indicating, when read with § 7, that the copyright on derivative work extends to both the new material and that "in which the copyright is already subsisting," such that the derivative work proprietor has the right to publish and distribute the entire work absent permission from the owner of the pre-existing work. When § 7 states that derivative works "shall be regarded as *new works* subject to copyright," it simply confirms that § 3's provision that one can obtain copyright in a work, parts of which were already copyrighted, extends to derivative works. More important, § 7's second clause merely clarifies what might have been otherwise unclear—that the § 3 principle of preservation of the duration or scope of the subsisting copyright applies to derivative works, and that neither the scope of the copyright in the matter employed nor the duration of the copyright in the derivative work is undermined by publication of the derivative work. Pp. 230–236.

2. Petitioners' unauthorized use of Woolrich's story in their film does not constitute a noninfringing "fair use." The film does not fall into any of the categories of fair use enumerated in 17 U. S. C. § 107 (1988 ed.); *e. g.*, criticism, comment, news reporting, teaching, scholarship, or research. Nor does it meet any of the nonexclusive criteria that § 107 requires a court to consider. First, since petitioners received $12 million from the film's re-release during the renewal term, their use was commercial rather than educational. Second, the nature of the copyrighted work is fictional and creative rather than factual. Third, the story was a substantial portion of the film, which expressly used its unique setting, characters, plot, and sequence of events. Fourth, and most important, the record supports the conclusion that re-release of the film impinged on Abend's ability to market new versions of the story. Pp. 236–238.

863 F. 2d 1465, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and KENNEDY, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 238. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 239.

Louis P. Petrich argued the cause for petitioners. With him on the briefs was *Gary L. Swingle.*

Peter J. Anderson argued the cause for respondent. With him on the briefs was *James P. Tierney.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The author of a pre-existing work may assign to another the right to use it in a derivative work. In this case the author of a pre-existing work agreed to assign the rights in his renewal copyright term to the owner of a derivative work, but died before the commencement of the renewal period. The question presented is whether the owner of the derivative work infringed the rights of the successor owner of the pre-existing work by continued distribution and publication of the derivative work during the renewal term of the pre-existing work.

I

Cornell Woolrich authored the story "It Had to Be Murder," which was first published in February 1942 in Dime Detective Magazine. The magazine's publisher, Popular Publications, Inc., obtained the rights to magazine publication of the story and Woolrich retained all other rights. Popular Publications obtained a blanket copyright for the issue of Dime Detective Magazine in which "It Had to Be Murder" was published.

**Stephen A. Kroft* filed a brief for Columbia Pictures Industries, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Register of Copyrights by *Dorothy Schrader, Ralph Oman,* and *William J. Roberts, Jr.;* for the Committee for Literary Property Studies by *Irwin Karp* and *Barbara Ringer;* and for the Songwriters Guild of America by *David Blasband.*

The Copyright Act of 1909 (1909 Act), 35 Stat. 1075, 17 U. S. C. § 1 *et seq.* (1976 ed.), provided authors a 28-year initial term of copyright protection plus a 28-year renewal term. See 17 U. S. C. § 24 (1976 ed.). In 1945, Woolrich agreed to assign the rights to make motion picture versions of six of his stories, including "It Had to Be Murder," to B. G. De Sylva Productions for $9,250. He also agreed to renew the copyrights in the stories at the appropriate time and to assign the same motion picture rights to De Sylva Productions for the 28-year renewal term. In 1953, actor Jimmy Stewart and director Alfred Hitchcock formed a production company, Patron, Inc., which obtained the motion picture rights in "It Had to Be Murder" from De Sylva's successors in interest for $10,000.

In 1954, Patron, Inc., along with Paramount Pictures, produced and distributed "Rear Window," the motion picture version of Woolrich's story "It Had to Be Murder." Woolrich died in 1968 before he could obtain the rights in the renewal term for petitioners as promised and without a surviving spouse or child. He left his property to a trust administered by his executor, Chase Manhattan Bank, for the benefit of Columbia University. On December 29, 1969, Chase Manhattan Bank renewed the copyright in the "It Had to Be Murder" story pursuant to 17 U. S. C. § 24 (1976 ed.). Chase Manhattan assigned the renewal rights to respondent Abend for $650 plus 10% of all proceeds from exploitation of the story.

"Rear Window" was broadcast on the ABC television network in 1971. Respondent then notified petitioners Hitchcock (now represented by cotrustees of his will), Stewart, and MCA Inc., the owners of the "Rear Window" motion picture and renewal rights in the motion picture, that he owned the renewal rights in the copyright and that their distribution of the motion picture without his permission infringed his copyright in the story. Hitchcock, Stewart, and MCA nonetheless entered into a second license with ABC to rebroad-

cast the motion picture. In 1974, respondent filed suit against these same petitioners, and others, in the United States District Court for the Southern District of New York, alleging copyright infringement. Respondent dismissed his complaint in return for $25,000.

Three years later, the United States Court of Appeals for the Second Circuit decided *Rohauer* v. *Killiam Shows, Inc.*, 551 F. 2d 484, cert. denied, 431 U. S. 949 (1977), in which it held that the owner of the copyright in a derivative work[1] may continue to use the existing derivative work according to the original grant from the author of the pre-existing work even if the grant of rights in the pre-existing work lapsed. 551 F. 2d, at 494. Several years later, apparently in reliance on *Rohauer*, petitioners re-released the motion picture in a variety of media, including new 35 and 16 millimeter prints for theatrical exhibition in the United States, videocassettes, and videodiscs. They also publicly exhibited the motion picture in theaters, over cable television, and through videodisc and videocassette rentals and sales.

Respondent then brought the instant suit in the United States District Court for the Central District of California against Hitchcock, Stewart, MCA, and Universal Film Exchanges, a subsidiary of MCA and the distributor of the motion picture. Respondent's complaint alleges that the re-release of the motion picture infringes his copyright in the story because petitioners' right to use the story during the renewal term lapsed when Woolrich died before he could register for the renewal term and transfer his renewal rights to them. Respondent also contends that petitioners have interfered with his rights in the renewal term of the story in other ways. He alleges that he sought to contract with Home Box

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[1] The Copyright Act of 1976 (1976 Act), 17 U. S. C. § 101 *et seq.* (1988 ed.), codified the definition of a "'derivative work'" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version . . . or any other form in which a work may be recast, transformed, or adapted." § 101.

Office (HBO) to produce a play and television version of the story, but that petitioners wrote to him and HBO stating that neither he nor HBO could use either the title, "Rear Window" or "It Had to Be Murder." Respondent also alleges that petitioners further interfered with the renewal copyright in the story by attempting to sell the right to make a television sequel and that the re-release of the original motion picture itself interfered with his ability to produce other derivative works.

Petitioners filed motions for summary judgment, one based on the decision in *Rohauer*, *supra*, and the other based on alleged defects in the story's copyright. Respondent moved for summary judgment on the ground that petitioners' use of the motion picture constituted copyright infringement. Petitioners responded with a third motion for summary judgment based on a "fair use" defense. The District Court granted petitioners' motions for summary judgment based on *Rohauer* and the fair use defense and denied respondent's motion for summary judgment, as well as petitioners' motion for summary judgment alleging defects in the story's copyright. Respondent appealed to the United States Court of Appeals for the Ninth Circuit and petitioners cross-appealed.

The Court of Appeals reversed, holding that respondent's copyright in the renewal term of the story was not defective. *Abend* v. *MCA, Inc.*, 863 F. 2d 1465, 1472 (1988). The issue before the court, therefore, was whether petitioners were entitled to distribute and exhibit the motion picture without respondent's permission despite respondent's valid copyright in the pre-existing story. Relying on the renewal provision of the 1909 Act, 17 U. S. C. § 24 (1976 ed.), respondent argued before the Court of Appeals that because he obtained from Chase Manhattan Bank, the statutory successor, the renewal right free and clear of any purported assignments of any interest in the renewal copyright, petitioners' distribution and publication of "Rear Window" without authorization infringed his renewal copyright. Petitioners responded that

they had the right to continue to exploit "Rear Window" during the 28-year renewal period because Woolrich had agreed to assign to petitioners' predecessor in interest the motion picture rights in the story for the renewal period.

Petitioners also relied, as did the District Court, on the decision in *Rohauer* v. *Killiam Shows, Inc., supra.* In *Rohauer,* the Court of Appeals for the Second Circuit held that statutory successors to the renewal copyright in a pre-existing work under § 24 could not "depriv[e] the proprietor of the derivative copyright of a right . . . to use so much of the underlying copyrighted work as already has been embodied in the copyrighted derivative work, as a matter of copyright law." *Id.,* at 492. The Court of Appeals in the instant case rejected this reasoning, concluding that even if the pre-existing work had been incorporated into a derivative work, use of the pre-existing work was infringing unless the owner of the derivative work held a valid grant of rights in the renewal term.

The court relied on *Miller Music Corp.* v. *Charles N. Daniels, Inc.,* 362 U. S. 373 (1960), in which we held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues. An assignee of the renewal rights takes only an expectancy: "Until [the time for registration of renewal rights] arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. A purchaser of such an interest is deprived of nothing. Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may not occur." *Id.,* at 378. The Court of Appeals reasoned that "[i]f *Miller Music* makes assignment of the full renewal rights in the underlying copyright unenforceable when the author dies before effecting renewal of the copyright, then, *a fortiori,* an assignment of part of the rights in the underlying work, the right to produce a movie version, must

also be unenforceable if the author dies before effecting renewal of the underlying copyright." 863 F. 2d, at 1476. Finding further support in the legislative history of the 1909 Act and rejecting the *Rohauer* court's reliance on the equities and the termination provisions of the 1976 Act, 17 U. S. C. §§ 203(b)(1), 304(c)(6)(A), the Court of Appeals concluded that petitioners received from Woolrich only an expectancy in the renewal rights that never matured; upon Woolrich's death, Woolrich's statutory successor, Chase Manhattan Bank, became "entitled to a renewal and extension of the copyright," which Chase Manhattan secured "within one year prior to the expiration of the original term of copyright." 17 U. S. C. § 24 (1976 ed.). Chase Manhattan then assigned the existing rights in the copyright to respondent.

The Court of Appeals also addressed at length the proper remedy, an issue not relevant to the issue on which we granted certiorari. We granted certiorari to resolve the conflict between the decision in *Rohauer*, *supra*, and the decision below. 493 U. S. 807 (1989). Petitioners do not challenge the Court of Appeals' determination that respondent's copyright in the renewal term is valid, and we express no opinion regarding the Court of Appeals' decision on this point.

II

A

Petitioners would have us read into the Copyright Act a limitation on the statutorily created rights of the owner of an underlying work. They argue in essence that the rights of the owner of the copyright in the derivative use of the pre-existing work are extinguished once it is incorporated into the derivative work, assuming the author of the pre-existing work has agreed to assign his renewal rights. Because we find no support for such a curtailment of rights in either the 1909 Act or the 1976 Act, or in the legislative history of either, we affirm the judgment of the Court of Appeals.

Petitioners and *amicus* Register of Copyrights assert, as the Court of Appeals assumed, that § 23 of the 1909 Act, 17 U. S. C. § 24 (1976 ed.), and the case law interpreting that provision, directly control the disposition of this case. Respondent counters that the provisions of the 1976 Act control, but that the 1976 Act re-enacted § 24 in § 304 and, therefore, the language and judicial interpretation of § 24 are relevant to our consideration of this case. Under either theory, we must look to the language of and case law interpreting § 24.

The right of renewal found in § 24 provides authors a second opportunity to obtain remuneration for their works. Section 24 provides:

> "[T]he author of [a copyrighted] work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright." 17 U. S. C. § 24 (1976 ed.)

Since the earliest copyright statute in this country, the copyright term of ownership has been split between an original term and a renewal term. Originally, the renewal was intended merely to serve as an extension of the original term; at the end of the original term, the renewal could be effected and claimed by the author, if living, or by the author's executors, administrators, or assigns. See Copyright Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124. In 1831, Congress altered the provision so that the author could assign his contingent interest in the renewal term, but could not, through his assignment, divest the rights of his widow or children in the renewal term. See Copyright Act of February 3, 1831, ch. XVI, 4 Stat. 436; see also G. Curtis, Law of Copyright 235

(1847). The 1831 renewal provisions created "an entirely new policy, completely dissevering the title, breaking up the continuance . . . and vesting an absolutely new title eo nomine in the persons designated." *White-Smith Music Publishing Co.* v. *Goff*, 187 F. 247, 250 (CA1 1911). In this way, Congress attempted to give the author a second chance to control and benefit from his work. Congress also intended to secure to the author's family the opportunity to exploit the work if the author died before he could register for the renewal term. See Bricker, Renewal and Extension of Copyright, 29 S. Cal. L. Rev. 23, 27 (1955) ("The renewal term of copyright is the law's second chance to the author and his family to profit from his mental labors"). "The evident purpose of [the renewal provision] is to provide for the family of the author after his death. Since the author cannot assign his family's renewal rights, [it] takes the form of a compulsory bequest of the copyright to the designated persons." *De Sylva* v. *Ballentine*, 351 U. S. 570, 582 (1956). See *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 651 (1943) (if at the end of the original copyright period, the author is not living, "his family stand[s] in more need of the only means of subsistence ordinarily left to them" (citation omitted)).

In its debates leading up to the Copyright Act of 1909, Congress elaborated upon the policy underlying a system comprised of an original term and a completely separate renewal term. See *G. Ricordi & Co.* v. *Paramount Pictures, Inc.*, 189 F. 2d 469, 471 (CA2) (the renewal right "creates a new estate, and the . . . cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright"), cert. denied, 342 U. S. 849 (1951). "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 14 (1909). The renewal term permits the author, originally in a poor bargaining position, to renegoti-

ate the terms of the grant once the value of the work has been tested. "[U]nlike real property and other forms of personal property, [a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation." 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 9.02, p. 9–23 (1989) (hereinafter Nimmer). "If the work proves to be a great success and lives beyond the term of twenty-eight years, . . . it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that [the author] could not be deprived of that right." H. R. Rep. No. 2222, *supra*, at 14. With these purposes in mind, Congress enacted the renewal provision of the Copyright Act of 1909, 17 U. S. C. § 24 (1976 ed.). With respect to works in their original or renewal term as of January 1, 1978, Congress retained the two-term system of copyright protection in the 1976 Act. See 17 U. S. C. §§ 304(a) and (b) (1988 ed.) (incorporating language of 17 U. S. C. § 24 (1976 ed.)).

Applying these principles in *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373 (1960), this Court held that when an author dies before the renewal period arrives, his executor is entitled to the renewal rights, even though the author previously assigned his renewal rights to another party. "An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period. *[Fred] Fisher Co.* v. *[M.] Witmark & Sons*, 318 U. S. 643, so holds." *Id.*, at 375. If the author dies before that time, the "next of kin obtain the renewal copyright free of any claim founded upon an assignment made by the author in his lifetime. These results follow not because the author's assignment is invalid but because he had only an expectancy to assign; and his death, prior to the renewal period, terminates his interest in the renewal which by § 24 vests in the named classes." *Ibid.* The legislative history of the 1909 Act echoes this view: "The right of renewal is contingent. It does not vest until the end [of the original term].

If [the author] is alive at the time of renewal, then the original contract may pass it, but his widow or children or other persons entitled would not be bound by that contract." 5 Legislative History of the 1909 Copyright Act, Part K, p. 77 (E. Brylawski & A. Goldman eds. 1976) (statement of Mr. Hale).[2] Thus, the renewal provisions were intended to give the author a second chance to obtain fair remuneration for his creative efforts and to provide the author's family a "new estate" if the author died before the renewal period arrived.

An author holds a bundle of exclusive rights in the copyrighted work, among them the right to copy and the right to incorporate the work into derivative works.[3] By assigning the renewal copyright in the work without limitation, as in *Miller Music*, the author assigns all of these rights. After *Miller Music*, if the author dies before the commencement of the renewal period, the assignee holds nothing. If the assignee of all of the renewal rights holds nothing upon the death of the assignor before arrival of the renewal period,

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[2] Neither *Miller Music* nor *Fred Fisher* decided the question of when the renewal rights vest, *i. e.*, whether the renewal rights vest upon commencement of the registration period, registration, or the date on which the original term expires and the renewal term begins. We have no occasion to address the issue here.

[3] Title 17 U. S. C. § 106 codifies the various rights a copyright holder possesses: "[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

then, *a fortiori*, the assignee of a portion of the renewal rights, *e. g.*, the right to produce a derivative work, must also hold nothing. See also Brief for Register of Copyrights as *Amicus Curiae* 22 ("*[A]ny* assignment of renewal rights made during the original term is void if the author dies before the renewal period"). Therefore, if the author dies before the renewal period, then the assignee may continue to use the original work only if the author's successor transfers the renewal rights to the assignee. This is the rule adopted by the Court of Appeals below and advocated by the Register of Copyrights. See 863 F. 2d, at 1478; Brief for Register of Copyrights as *Amicus Curiae* 22. Application of this rule to this case should end the inquiry. Woolrich died before the commencement of the renewal period in the story, and, therefore, petitioners hold only an unfulfilled expectancy. Petitioners have been "deprived of nothing. Like all purchasers of contingent interests, [they took] subject to the possibility that the contingency may not occur." *Miller Music*, *supra*, at 378.

B

The reason that our inquiry does not end here, and that we granted certiorari, is that the Court of Appeals for the Second Circuit reached a contrary result in *Rohauer* v. *Killiam Shows, Inc.*, 551 F. 2d 484 (1977). Petitioners' theory is drawn largely from *Rohauer*. The Court of Appeals in *Rohauer* attempted to craft a "proper reconciliation" between the owner of the pre-existing work, who held the right to the work pursuant to *Miller Music*, and the owner of the derivative work, who had a great deal to lose if the work could not be published or distributed. 551 F. 2d, at 490. Addressing a case factually similar to this case, the court concluded that even if the death of the author caused the renewal rights in the pre-existing work to revert to the statutory successor, the owner of the derivative work could continue to exploit that work. The court reasoned that the 1976 Act and the relevant precedents did not preclude such a re-

sult and that it was necessitated by a balancing of the equities:

> "[T]he equities lie preponderantly in favor of the proprietor of the derivative copyright. In contrast to the situation where an assignee or licensee has done nothing more than print, publicize and distribute a copyrighted story or novel, a person who with the consent of the author has created an opera or a motion picture film will often have made contributions literary, musical and economic, as great as or greater than the original author. . . . [T]he purchaser of derivative rights has no truly effective way to protect himself against the eventuality of the author's death before the renewal period since there is no way of telling who will be the surviving widow, children or next of kin or the executor until that date arrives." *Id.*, at 493.

The Court of Appeals for the Second Circuit thereby shifted the focus from the right to use the pre-existing work in a derivative work to a right inhering in the created derivative work itself. By rendering the renewal right to use the original work irrelevant, the court created an exception to our ruling in *Miller Music* and, as petitioners concede, created an "intrusion" on the statutorily created rights of the owner of the pre-existing work in the renewal term. Brief for Petitioners 33.

Though petitioners do not, indeed could not, argue that its language expressly supports the theory they draw from *Rohauer*, they implicitly rely on § 6 of the 1909 Act, 17 U. S. C. § 7 (1976 ed.), which states that "dramatizations . . . of copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded as new works subject to copyright under the provisions of this title." Petitioners maintain that the creation of the "new," *i. e.*, derivative, work extinguishes any right the owner of rights in the pre-existing work might have had to sue for infringement that occurs during the renewal term.

We think, as stated in Nimmer, that "[t]his conclusion is neither warranted by any express provision of the Copyright Act, nor by the rationale as to the scope of protection achieved in a derivative work. It is moreover contrary to the axiomatic copyright principle that a person may exploit only such copyrighted literary material as he either owns or is licensed to use." 1 Nimmer § 3.07[A], pp. 3–23 to 3–24 (footnotes omitted). The aspects of a derivative work added by the derivative author are that author's property, but the element drawn from the pre-existing work remains on grant from the owner of the pre-existing work. See *Russell* v. *Price*, 612 F. 2d 1123, 1128 (CA9 1979) (reaffirming "well-established doctrine that a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work"), cert. denied, 446 U. S. 952 (1980); see also *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 547 (1985) ("The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality"). So long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work. *Russell* v. *Price*, *supra*, at 1128 ("[E]stablished doctrine prevents unauthorized copying or other infringing use of the underlying work or any part of that work contained in the derivative product so long as the underlying work itself remains copyrighted"). It is irrelevant whether the pre-existing work is inseparably intertwined with the derivative work. See *Gilliam* v. *American Broadcasting Cos.*, 538 F. 2d 14, 20 (CA2 1976) ("[C]opyright in the underlying script survives intact despite the incorporation of that work into a derivative work"). Indeed, the plain language of § 7 supports the view that the full force of the copyright in the pre-existing work is preserved despite incorporation into the derivative work. See 17 U. S. C. § 7 (1976 ed.) (publication of the derivative work "shall not affect the force or validity of

any subsisting copyright upon the matter employed"); see also 17 U. S. C. § 3 (1976 ed.) (copyright protection of a work extends to "all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright"). This well-settled rule also was made explicit in the 1976 Act:

> "The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material." 17 U. S. C. § 103(b).

See also B. Ringer, Renewal of Copyright (1960), reprinted as Copyright Law Revision Study No. 31, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d. Sess., 169–170 (1961) ("[O]n the basis of judicial authority, legislative history, and the opinions of the commentators, . . . someone cannot avoid his obligations to the owner of a renewal copyright merely because he created and copyrighted a 'new version' under a license or assignment which terminated at the end of the first term") (footnotes omitted).

Properly conceding there is no explicit support for their theory in the 1909 Act, its legislative history, or the case law, petitioners contend, as did the court in *Rohauer*, that the termination provisions of the 1976 Act, while not controlling, support their theory of the case. For works existing in their original or renewal terms as of January 1, 1978, the 1976 Act added 19 years to the 1909 Act's provision of 28 years of initial copyright protection and 28 years of renewal protection. See 17 U. S. C. §§ 304(a) and (b). For those works, the author has the power to terminate the grant of rights at the end of the renewal term and, therefore, to gain the benefit of that additional 19 years of protection. See

§ 304(c). In effect, the 1976 Act provides a third opportunity for the author to benefit from a work in its original or renewal term as of January 1, 1978. Congress, however, created one exception to the author's right to terminate: The author may not, at the end of the renewal term, terminate the right to use a derivative work for which the owner of the derivative work has held valid rights in the original and renewal terms. See § 304(c)(6)(A). The author, however, may terminate the right to create new derivative works. *Ibid.* For example, if petitioners held a valid copyright in the story throughout the original and renewal terms, and the renewal term in "Rear Window" were about to expire, petitioners could continue to distribute the motion picture even if respondent terminated the grant of rights, but could not create a new motion picture version of the story. Both the court in *Rohauer* and petitioners infer from this exception to the right to terminate an intent by Congress to prevent authors of pre-existing works from blocking distribution of derivative works. In other words, because Congress decided not to permit authors to exercise a third opportunity to benefit from a work incorporated into a derivative work, the Act expresses a general policy of undermining the author's second opportunity. We disagree.

The process of compromise between competing special interests leading to the enactment of the 1976 Act undermines any such attempt to draw an overarching policy out of § 304(c)(6)(A), which only prevents termination with respect to works in their original or renewal copyright terms as of January 1, 1978, and only at the end of the renewal period. See Ringer, First Thoughts on the Copyright Act of 1976, 13 Copyright 187, 188–189 (1977) (each provision of 1976 Act was drafted through series of compromises between interested parties). More specifically, § 304(c)

> "was part of a compromise package involving the controversial and intertwined issues of initial ownership, duration of copyright, and reversion of rights. The Regis-

ter, convinced that the opposition . . . would scuttle the proposed legislation, drafted a number of alternative proposals. . . .

"Finally, the Copyright Office succeeded in urging negotiations among representatives of authors, composers, book and music publishers, and motion picture studios that produced a compromise on the substance and language of several provisions.

. . . . . .

"Because the controversy surrounding the provisions disappeared once the parties reached a compromise, however, Congress gave the provisions little or no detailed consideration. . . . Thus, there is no evidence whatsoever of what members of Congress believed the language to mean." Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 865–868 (1987) (footnotes omitted).

In fact, if the 1976 Act's termination provisions provide any guidance at all in this case, they tilt against petitioners' theory. The plain language of the termination provision itself indicates that Congress assumed that the owner of the pre-existing work possessed the right to sue for infringement even after incorporation of the pre-existing work in the derivative work.

"A derivative work *prepared* under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." § 304(c)(6)(A) (emphasis added).

Congress would not have stated explicitly in § 304(c)(6)(A) that, at the end of the renewal term, the owner of the rights in the pre-existing work may not terminate use rights in existing derivative works unless Congress had assumed that

the owner continued to hold the right to sue for infringement even after incorporation of the pre-existing work into the derivative work. Cf. *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 164 (1985) (§ 304(c)(6)(A) "carves out an exception from the reversion of rights that takes place when an author exercises his right to termination").

Accordingly, we conclude that neither the 1909 Act nor the 1976 Act provides support for the theory set forth in *Rohauer*. And even if the theory found some support in the statute or the legislative history, the approach set forth in *Rohauer* is problematic. Petitioners characterize the result in *Rohauer* as a bright-line "rule." The Court of Appeals in *Rohauer*, however, expressly implemented policy considerations as a means of reconciling what it viewed as the competing interests in that case. See 551 F. 2d, at 493–494. While the result in *Rohauer* might make some sense in some contexts, it makes no sense in others. In the case of a condensed book, for example, the contribution by the derivative author may be little, while the contribution by the original author is great. Yet, under the *Rohauer* "rule," publication of the condensed book would not infringe the pre-existing work even though the derivative author has no license or valid grant of rights in the pre-existing work. See Brief for Committee for Literary Property Studies as *Amicus Curiae* 29–31; see also Brief for Songwriters Guild of America as *Amicus Curiae* 11–12 (policy reasons set forth in *Rohauer* make little sense when applied to musical compositions). Thus, even if the *Rohauer* "rule" made sense in terms of policy in that case, it makes little sense when it is applied across the derivative works spectrum. Indeed, in the view of the commentators, *Rohauer* did not announce a "rule," but rather an "interest-balancing approach." See Jaszi, When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest, 28 UCLA L. Rev. 715, 758–761 (1981); Note, Derivative Copyright and the 1909

Act—New Clarity or Confusion?, 44 Brooklyn L. Rev. 905, 926–927 (1978).

Finally, petitioners urge us to consider the policies underlying the Copyright Act. They argue that the rule announced by the Court of Appeals will undermine one of the policies of the Act—the dissemination of creative works—by leading to many fewer works reaching the public. *Amicus* Columbia Pictures asserts that "[s]ome owners of underlying work renewal copyrights may refuse to negotiate, preferring instead to retire their copyrighted works, and all derivative works based thereon, from public use. Others may make demands—like respondent's demand for 50% of petitioners' future gross proceeds in excess of advertising expenses . . .—which are so exorbitant that a negotiated economic accommodation will be impossible." Brief for Columbia Pictures et al. as *Amici Curiae* 21. These arguments are better addressed by Congress than the courts.

In any event, the complaint that respondent's monetary request in this case is so high as to preclude agreement fails to acknowledge that an initially high asking price does not preclude bargaining. Presumably, respondent is asking for a share in the proceeds because he wants to profit from the distribution of the work, not because he seeks suppression of it.

Moreover, although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984) (the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"). But nothing in the copyright statutes would

prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. See *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127 (1932).

The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use. See *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S., at 546 ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors"); Register of Copyrights, Copyright Law Revision, 87th Cong., 1st Sess., 6 (Comm. Print 1961) ("While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. . . . [T]heir rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works"). When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work. That is how the separate renewal term was intended to operate. See Ringer, Renewal of Copyright (1960), reprinted as Copyright Law Revision Study No. 31, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d. Sess., 125 (1961) ("Congress wanted to give [the author] an opportunity to benefit from the success of his work and to renegotiate disadvantageous bargains . . . made at a time when the value of the work [wa]s unknown or conjectural and the author . . . necessarily in a poor bargaining position"). At heart, petitioners' true complaint is that they will have to pay more for the use of works they have employed in creating their own works. But such a result was contemplated by Congress and is consistent with the goals of the Copyright Act.

With the Copyright Act of 1790, Congress provided an initial term of protection plus a renewal term that did not survive the author. In the Copyright Act of 1831, Congress devised a completely separate renewal term that survived the death of the author so as to create a "new estate" and to benefit the author's family, and, with the passage of the 1909 Act, his executors. See *supra*, at 217–219. The 1976 Copyright Act provides a single, fixed term, but provides an inalienable termination right. See 17 U. S. C. §§ 203, 302. This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." U. S. Const., Art. I, § 8, cl. 8. Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished upon incorporation of his work into another work, it is not our role to alter the delicate balance Congress has labored to achieve.

C

In a creative, though ultimately indefensible, exposition of the 1909 Act, the dissent attempts to breathe life into petitioners' suggestion that the derivative work is somehow independent of the pre-existing work. Although no Court of Appeals in the 81 years since enactment of the 1909 Act has held as much, and although the petitioners have not argued the point, the dissent contends that "§ 7 was intended to . . . give the original author the power to sell the right to make a derivative work that upon creation and copyright would be completely independent of the original work." *Post*, at 244; see also *post*, at 248. This assertion, far removed from the more modest holding of *Rohauer*, is derived from three erroneous premises.

First, we think the dissent misreads § 7, which provides:

> "Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of

> works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works." 17 U. S. C. § 7 (1976 ed.).

The provision consists of one sentence with two clauses divided by a semicolon. The first clause lists the types of works that may be derivative works, explains that one may incorporate either copyrighted or public domain works into a derivative work, and further explains that the derivative work itself is copyrightable. The clause also expressly limits incorporation of copyrighted works to instances where the owner of the pre-existing work "consents."

The second clause explains what publication of the new work does *not* portend: Publication of the derivative work does not "*affect the force or validity of any subsisting copyright upon the matter employed*" (emphasis added); publication of the derivative work does not mean that use of the original work in other works is precluded; and publication does not mean that a copyright in the original work shall be secured, *e. g.*, if the work was in the public domain, or extended, as where the original work was copyrighted before the date that the derivative work is copyrighted. The plain meaning of the italicized sentence is that the copyright in the "matter employed"—the pre-existing work when it is incorporated into the derivative work—is not abrogated by publication of the new work. The succeeding phrases preserve the copyright status of the original work: Publication does not operate to prohibit other uses of the original work or to

"secure or extend copyright in such original works." Cf. *post*, at 249.

The dissent fails to heed § 7's preservation of copyright in both the "matter employed" and the "original work." Under its theory, only the latter is preserved. See *post*, at 253 ("author's right to sell his derivative rights is exercised when consent is conveyed and completed when the derivative work is copyrighted"); *post*, at 250 (underlying work "owner . . . retains full dominion and control over all other means of exploiting" underlying work). In light of § 7's explicit preservation of the "force and validity" of the copyright in the "matter employed," the dissent is clearly wrong when it asserts that § 7 was intended to create a work that is "completely independent" of the pre-existing work. *Post*, at 245. The dissent further errs when it unjustifiably presumes that § 7 "limit[s] the enforceability of the derivative copyright." *Post*, at 249.

According to the dissent, § 7 requires the derivative work author to obtain "consent of the proprietor of the copyright" in the pre-existing work, because "§ 7 . . . derogate[s] in some manner from the underlying author's copyright rights." *Post*, at 241. The more natural inference to be drawn from the requirement of consent is that Congress simply intended that a derivative work author may not employ a copyrighted work without the author's permission, although of course he can obtain copyright protection for his own original additions.

The text of § 7 reveals that it is not "surplusage." *Post*, at 244. It does not merely stand for the proposition that authors receive copyright protection for their original additions. It also limits the effect of the publication of the derivative work on the underlying work. See *supra*, at 231 and this page. Nowhere else in the Act does Congress address the treatment to be afforded derivative works. The principle that additions and improvements to existing works of art receive copyright protection was settled at the time the 1909 Act was enacted, a principle that Congress simply codified in § 7.

Second, the dissent attempts to undercut the plain meaning of § 7 by looking to its legislative history and the substitution of the term "publication" for "copyright" in the force or validity clause. According to the dissent, that particular alteration in the proposed bill "made clear that it was the publication of the derivative work, not the copyright itself, that was not to 'affect the force or validity of any subsisting copyright.'" *Post*, at 249. Under the 1909 Act, it was necessary to publish the work with proper notice to obtain copyright. Publication of a work without proper notice automatically sent a work into the public domain. See generally 2 Nimmer § 7.02[C][1]; 17 U. S. C. § 10 (1976 ed.). The language change was suggested only to ensure that the publication of a "new compiled work" without proper notice, including smaller portions that had not been previously published and separately copyrighted, would not result in those sections moving into the public domain. See Note, 44 Brooklyn L. Rev., at 919–920. Had the bill retained the term "copyright," publication alone could have affected the force or validity of the copyright in the pre-existing work. Thus, far from telling us anything about the copyright in the derivative work, as the dissent apparently believes it does, the language change merely reflects the practical operation of the Act.

Third, we think the dissent errs in its reading of § 3. Section 3 provides:

> "The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright." 17 U. S. C. § 3 (1976 ed.).

The dissent reasons that § 7, "read together with § 3, plainly indicates that the copyright on a derivative work extends to both the new material and that 'in which copyright is already subsisting.' The author or proprietor of the derivative work therefore has the statutory right to publish and distribute the entire work." *Post*, at 241. Section 3, however,

undermines, rather than supports, the dissent's ultimate conclusion that the derivative work is "completely independent" of the pre-existing work. *Post*, at 245. Section 3 makes three distinct points: (1) copyright protects the copyrightable parts of the work; (2) copyright extends to parts of the work in which copyright was already obtained, and (3) the duration or scope of the copyright already obtained will not be extended. Important for this case is that § 3 provides that one can obtain copyright in a work where parts of the work are already copyrighted. For example, one could obtain a copyright in an opera even though three of the songs to be used were already copyrighted. This, and only this, is what is meant in § 7 when it states that "[c]ompilations or abridgments, adaptations, arrangements, dramatizations, translations or other versions of works . . . or works republished with new matter shall be regarded as *new works* subject to copyright under the provisions of this title."

More important, however, is that under the express language of § 3, one obtains a copyright on the entire work, but the parts previously copyrighted get copyright protection only according to the "duration or scope" of the already existing copyright. Thus, if an author attempts to obtain copyright in a book derived from a short story, he can obtain copyright on the book for the full copyright term, but will receive protection of the story parts only for the duration and scope of the rights previously obtained. Correlatively, if an author attempts to copyright a novel, *e. g.*, about Cinderella, and the story elements are already in the public domain, the author holds a copyright in the novel, but may receive protection only for his original additions to the Cinderella story. See *McCaleb* v. *Fox Film Corp.*, 299 F. 48 (CA5 1924); *American Code Co.* v. *Bensinger*, 282 F. 829 (CA2 1922).

The plain language of the first clause of § 7 ensures that this scheme is carried out with respect to "[c]ompilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain

or of copyrighted works . . . or works republished with new matter," *i. e.*, derivative works. The second clause of § 7 clarifies what might have been otherwise unclear—that the principle in § 3 of preservation of the duration or scope of the subsisting copyright applies to derivative works, and that neither the scope of the copyright in the matter employed nor the duration of the copyright in the original work is undermined by publication of the derivative work. See *Adventures in Good Eating* v. *Best Places to Eat*, 131 F. 2d 809, 813, n. 3 (CA7 1942); *G. Ricordi & Co.* v. *Paramount Pictures, Inc.*, 189 F. 2d 469 (CA2), cert. denied, 342 U. S. 849 (1951); *Russell* v. *Price*, 612 F. 2d, at 1128; see also 1 Nimmer § 3.07.

If one reads the plain language of § 7 and § 3 together, one must conclude that they were enacted in no small part to ensure that the copyright in the pre-existing work would not be abrogated by the derivative work. Section 7 requires consent by the author of the pre-existing work before the derivative work may be produced, and both provisions explicitly require that the copyright in the "subsisting work" will not be abrogated by incorporation of the work into another work.

If the dissent's theory were correct, § 3 need only say that "copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting." Instead, § 3 goes on to say that the latter coverage exists "without extending the duration or scope of such copyright." Clearly, the 1909 Act's plain language requires that the underlying work's copyright term exists *independently* of the derivative work's term, even when incorporated and even though the derivative work holder owns copyright in the whole "work." If the terms must exist separately, each copyright term must be examined for the validity and scope of its grant of rights.

In this case, the grant of rights in the pre-existing work lapsed and, therefore, the derivative work owners' rights to

use those portions of the pre-existing work incorporated into the derivative work expired. Thus, continued use would be infringing; whether the derivative work may continue to be published is a matter of remedy, an issue which is not before us. To say otherwise is to say that the derivative work nullifies the "force" of the copyright in the "matter employed." Whether or not we believe that this is good policy, this is the system Congress has provided, as evidenced by the language of the 1909 Act and the cases decided under the 1909 Act. Although the dissent's theory may have been a plausible option for a legislature to have chosen, Congress did not so provide.

III

Petitioners assert that even if their use of "It Had to Be Murder" is unauthorized, it is a fair use and, therefore, not infringing. At common law, "the property of the author . . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same." *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 299 (1907). The fair use doctrine, which is incorporated into the 1976 Act, evolved in response to this absolute rule. See *Harper & Row*, 471 U. S., at 549–551. The doctrine is an "'equitable rule of reason,'" *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 448, which "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F. 2d 57, 60 (CA2 1980). Petitioners contend that the fair use doctrine should be employed in this case to "avoid [a] rigid applicatio[n] of the Copyright Act." Brief for Petitioners 42.

In 17 U. S. C. § 107, Congress provided examples of fair use, *e. g.*, copying "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," and listed four

nonexclusive factors that a court must consider in determining whether an unauthorized use is not infringing:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

The Court of Appeals determined that the use of Woolrich's story in petitioners' motion picture was not fair use. We agree. The motion picture neither falls into any of the categories enumerated in § 107 nor meets the four criteria set forth in § 107. "[E]very [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America* v. *Universal Studios, Inc.*, *supra*, at 451. Petitioners received $12 million from the re-release of the motion picture during the renewal term. 863 F. 2d, at 1468. Petitioners asserted before the Court of Appeals that their use was educational rather than commercial. The Court of Appeals found nothing in the record to support this assertion, nor do we.

Applying the second factor, the Court of Appeals pointed out that "[a] use is less likely to be deemed fair when the copyrighted work is a creative product." 863 F. 2d, at 1481 (citing *Brewer* v. *Hustler Magazine, Inc.*, 749 F. 2d 527, 529 (CA9 1984)). In general, fair use is more likely to be found in factual works than in fictional works. See 3 Nimmer § 13.05[A], pp. 13–77 to 13–78 ("[A]pplication of the fair use defense [is] greater . . . in the case of factual works than in the case of works of fiction or fantasy"); cf. *Harper & Row*, 471 U. S., at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fan-

tasy"). A motion picture based on a fictional short story obviously falls into the latter category.

Examining the third factor, the Court of Appeals determined that the story was a substantial portion of the motion picture. See 471 U. S., at 564–565 (finding unfair use where quotation from book "'took what was essentially the heart of the book'"). The motion picture expressly uses the story's unique setting, characters, plot, and sequence of events. Petitioners argue that the story constituted only 20% of the motion picture's story line, Brief for Petitioners 40, n. 69, but that does not mean that a substantial portion of the story was not used in the motion picture. "[A] taking may not be excused merely because it is insubstantial with respect to the *infringing* work." *Harper & Row*, *supra*, at 565.

The fourth factor is the "most important, and indeed, central fair use factor." 3 Nimmer § 13.05[A], p. 13–81. The record supports the Court of Appeals' conclusion that rerelease of the film impinged on the ability to market new versions of the story. Common sense would yield the same conclusion. Thus, all four factors point to unfair use. "This case presents a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story owner's adaptation rights." 863 F. 2d, at 1482.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

Although I am not convinced, as the Court seems to be, that the decision in *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373 (1960), was required by the Copyright Act, neither am I convinced that it was an impermissible construction of the statute. And because *Miller Music*, in my view, requires the result reached by the Court in this case, I concur in the judgment of affirmance.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Constitution authorizes the Congress:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U. S. Const. Art. I, § 8, Cl. 8.

Section 6 of the Copyright Act of 1909, 35 Stat. 1077, 17 U. S. C. § 7 (1976 ed.) (hereafter § 7), furthers that purpose; § 23 of that Act, 17 U. S. C. § 24 (1976 ed.) (hereafter § 24), as construed by the Court in this case, does not. It is therefore appropriate to begin with § 7.[1]

I

In a copyright case, as in any other case, the language of the statute provides the starting point. *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 739 (1989); *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 164 (1985).

Section 7 provides in pertinent part:

> "Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of

[1] Although the Court of Appeals determined the rights of the parties by looking to the 1909 Act, respondent now argues that the 1976 Act is applicable. At the time petitioners secured their copyright in the film in 1954, and respondent renewed his copyright in the short story in 1969, the Copyright Act of 1909 was in effect. There is no evidence that Congress in the Copyright Act of 1976 intended to abrogate rights created under the previous Act. I therefore take it as evident that while the cause of action under which respondent sues may have been created by the 1976 Act, the respective property rights of the parties are determined by the statutory grant under the 1909 Act. See *Roth* v. *Pritikin*, 710 F. 2d 934, 938 (CA2), cert. denied, 464 U. S. 961 (1983); *International Film Exchange, Ltd.* v. *Corinth Films, Inc.*, 621 F. Supp. 631 (SDNY 1985); Jaszi, When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest, 28 UCLA L. Rev. 715, 746–747 (1981) (hereinafter Jaszi). Cf. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.11, p. 1–96 (1989) (hereinafter Nimmer) (no explicit statement of a legislative intent to apply the current Act retroactively).

> works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

This statutory provision deals with derivative works—works that include both old material and new material. The plain language of § 7 confers on the entire derivative work—not just the new material contained therein—the status of all other works of authorship, that of "new works subject to copyright under the provisions of this title." Among those rights is that specified in § 3 of the 1909 Act, 17 U. S. C. § 3 (1976 ed.), which applies both to composite and derivative works and states that "the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright." In turn, under § 1, 17 U. S. C. § 1 (1976 ed.), the author or proprietor of the copyright has the right to distribute and publicly perform the copyrighted derivative work. §§ 1(a), 1(d).[2] The statute does not say

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[2] Section 1 of the 1909 Act, 35 Stat. 1075, provides in pertinent part:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

. . . . .

"(d) To perform or represent the copyrighted work publicly if it be a drama . . . ; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

In its response to this dissent, the Court completely ignores the plain language of § 1.

anything about the duration of the copyright being limited to the underlying work's original term; rather, derivative works made with the consent of the author and derivative works based on matter in the public domain are treated identically. They are both given independent copyright protection. Section 7, read together with § 3, plainly indicates that the copyright on a derivative work extends to both the new material and that "in which copyright is already subsisting." § 3. The author or proprietor of the derivative work therefore has the statutory right to publish and distribute the entire work.[3]

The structure of § 7 confirms this reading. The statute does not merely provide the derivative author with a right to copyright but goes on to set limitations and conditions on that copyright. The statute makes "the consent of the proprietor of the [underlying] copyright" a precondition for copyright of the derivative work, a provision that would make little sense if the copyright provided by § 7 did not derogate in some manner from the underlying author's copyright rights.[4] The

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[3] The Court states that this reading of § 7 is "creative," has not been adopted by any Court of Appeals in the history of the 1909 Act, and has not been argued by petitioners. *Ante*, at 230. Although I am flattered by this comment, I must acknowledge that the credit belongs elsewhere. In their briefs to this Court, petitioners and their *amici* argue that § 7 created an independent but limited copyright in the entire derivative work entitled to equal treatment with original works under the renewal and duration provisions of § 24. Brief for Petitioners 14–15, 17, 21, 29–30; Brief for Columbia Pictures Industries, Inc., et al., as *Amici Curiae* 11, 13, 15. That was also the central argument of Judge Friendly in his opinion for the Court of Appeals for the Second Circuit, see *Rohauer* v. *Killiam Shows, Inc.*, 551 F. 2d 484, 487–488, 489–490, 493–494, cert. denied, 431 U. S. 949 (1977), and Judge Thompson dissenting from the panel decision below, see *Abend* v. *MCA, Inc.*, 863 F. 2d 1465, 1484–1487 (CA9 1988). Indeed, Judge Friendly only addressed the equities with great reservation, 551 F. 2d, at 493, after "a close reading of the language of what is now § 7." *Id.*, at 489.

[4] The drafters of the 1909 Act were well aware of the difficulty of contacting distant authors who no longer wished to enforce their copyright

statute also directs that the right granted the derivative work proprietor should not "be construed to imply an exclusive right to such use of the original works," suggesting, by negative implication, that it should be read to include a nonexclusive right to use of the original works. The provision that *publication* "shall not affect the force or validity of any subsisting copyright" also suggests that publication would otherwise have the capacity to affect the force or validity of the original copyright: By publishing the derivative work

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rights. In § 24, for example, Congress provided that a proprietor could secure and renew copyright on a composite work when the individual contributions were not separately registered. The provision was apparently addressed to the difficulties such proprietors had previously faced in locating and obtaining the consent of authors at the time of renewal. See H. R. Rep. No. 2222, 60th Cong., 2d Sess., 15 (1909); 1 Legislative History of the 1909 Copyright Act, Part C, p. 56 (E. Brylawski & A. Goldman eds. 1976) (statement of Mr. Elder) (hereinafter Brylawski & Goldman); 5 *id.*, Part K, pp. 18–19 (statement of Mr. Putnam); 5 *id.*, Part K, p. 77 (statement of Mr. Hale). See also Elder, Duration of Copyright, 14 Yale L. J. 417, 418 (1905). The effect of the § 7 consent requirement under the Court's reading should not only be to forbid the author of the derivative work to "employ a copyrighted work without the author's permission," *ante*, at 232, but also to penalize him by depriving him both of the right to use his own new material and, in theory, of the right to protect that new material against use by the public. It is most unlikely that a Congress which intended to promote the creation of literary works would have conditioned the protection of new material in an otherwise original work on "consent" of an original author who did not express the desire to protect his own work.

The Court of Appeals thought that the failure of Congress to grant an "exemption" to derivative works similar to that it granted composite works demonstrated its intention that derivative works lapse upon termination of the underlying author's copyright interest. 863 F. 2d, at 1476. Section 24, however, does not exempt composite works from the renewal provision, but merely provides for their renewal by the proprietor alone when the individual contributions are not separately copyrighted. See 2 Nimmer § 9.03[B], p. 9–36. Moreover, the "author," entitled to renewal under § 24, refers back to the author of the original work and the derivative work. Congress did not need to make special provision for the derivative work in § 24 because it already did so in § 7, making it a new work "subject to copyright under the provisions of this title." 17 U. S. C. § 7 (1976 ed.).

without satisfying the notice requirements of the Act, the derivative author would dedicate to the public not only his own original contribution, but also that of the original author. Conversely, the limitation that publication does not "secure or extend copyright in such original works" would be unnecessary if the copyrighted derivative work did not include within it some of the material covered by the earlier copyright, or if the term of the derivative copyright did not extend beyond the life of the original copyright.[5] Although the derivative copyright *protects* only the new material contained within the new work, that limitation is not the product of the limited extent of the copyright—which encompasses both new and old material—but rather of the specific statutory language restricting its effect against third parties.[6]

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[5] It is instructive to compare the language of § 7 to that used by Congress in 1976 to indicate that copyright in a derivative work under the new Act attached only to the new material:

"The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U. S. C. § 103(b) (1988 ed.).

[6] I thus agree with the Court that publication of a derivative work cannot extend the scope or duration of the copyright in the original work, *ante*, at 234–235, and that the underlying work's copyright term exists independently of the derivative work's term. *Ante*, at 231–232, 235. As much is clear from the language of § 7, which extends the copyright to the entire work, but then limits the effect of that copyright. I further agree that the original author's right to "consent" to the copyright of a derivative work terminates when the statutory term of the copyright in the underlying work expires. *Ante*, at 235. As I explain, *infra* at 251–253, that result follows from the language of § 24. I do not agree, however, that the statutory right to distribute and publicly perform a derivative work that has been copyrighted with the original author's consent during the original term of the underlying work is limited by the validity and scope of the original copyright. *Ante*, at 235. Section 7, in conjunction with § 24, gives the derivative author two full terms of copyright in the entire derivative

Any other interpretation would render the provision largely surplusage. The Copyright Act of 1909 elsewhere accords protection to "all the writings of an author," § 4, including dramatic composition, § 5, and long before the Act of 1909, it was recognized that the additions and improvements to existing works of art were subject to copyright as original works of authorship.[7] Congress would hardly have needed to provide for the copyright of derivative works, including the detailed provisions on the limit of that copyright, if it intended only to accord protection to the improvements to an original work of authorship. In my opinion, § 7 was intended to do something more: to give the original author the power

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work both when the original work is used with the consent of the original author and when the original work is in the public domain. My conclusion thus rests upon the language of the statute. The Court's contrary assertion, that if the right to publish the derivative work extended beyond the original term of the underlying work it would "nulli[fy] the 'force' of the copyright in the 'matter employed,'" *ante*, at 236, simply begs the question of the extent of the original author's statutory rights. Even after the derivative work has been copyrighted, the original author retains all of his statutory rights, including the right to consent to the creation of additional derivative works during both the original and renewal terms. Moreover, even if the derivative work did derogate from the force of the original work, the provision to which the Court apparently refers states only that "*publication*" of a derivative work—and not consent to its creation—shall not affect the force of the copyright in the matter employed. The Court can avoid making § 7 complete surplus (and allow it to limit the rights of both the original and the derivative author) only by distorting the plain language of that provision.

[7] See, *e. g.*, *Gray* v. *Russell*, 10 F. Cas. 1035, 1037–1038 (No. 5,728) (CC Mass. 1839); *Emerson* v. *Davies*, 8 F. Cas. 615, 618–619 (No. 4,436) (CC Mass. 1845); *Shook* v. *Rankin*, 21 F. Cas. 1335, 1336 (No. 12,804) (CC N. D. Ill. 1875). The Court's difficulty in explaining away the language of § 7 is not surprising. The authority upon whom it almost exclusively relies, see *ante*, at 223, had the same difficulty, stating at one point that "[t]he statutory text was somewhat ambiguous," 1 Nimmer, p. 3–22.2, and admitting at another that under his reading of the Copyright Act the provision was largely irrelevant. See *id.*, at 3–29, n. 17 ("[I]t is consent referred to in Sec. 7, but which would have efficacy as a matter of contract law even without Sec. 7"). At least in the Copyright Act of 1909, however, Congress knew exactly what it was doing.

to sell the right to make a derivative work that upon creation and copyright would be completely independent of the original work.

II

The statutory background supports the conclusion that Congress intended the original author to be able to sell the right to make a derivative work that could be distributed for the full term of the derivative work's copyright protection. At the time of the enactment of § 7, copyright in the right to dramatize a nondramatic work was a relatively recent innovation with equivocal support. Until 1870, an author had only the right to prevent the copying or vending of his work in the identical medium.[8] The Act of 1870, which gave the author the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending," made a limited start toward further protection, providing that "authors may reserve the right to dramatize or to translate their own works." Ch. 230, § 86, 16 Stat. 212. The identical language was carried over when the statute was revised in 1873. Rev. Stat. § 4952. The Act of 1891 was a landmark. It gave the same rights to the "author" as had the previous statutes, but provided further that "authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." Ch. 565, § 4952, 26 Stat. 1107. The case law was in accord. Although courts were occasionally willing to enjoin abridgments as infringing, in 1853 Justice Grier wrote that a dramatization of the novel "Uncle Tom's Cabin" would not infringe

[8] The Act of 1790, passed by the First Congress, provided "the sole right and liberty of printing, reprinting, publishing and vending" the copyrighted work. § 1, 1 Stat. 124. Its successor, the Act of 1831, repeated the language that the author of a copyrighted work "shall have the sole right and liberty of printing, reprinting, publishing, and vending" the work. Ch. 16, § 1, 4 Stat. 436. Benjamin Kaplan has written that the Act of 1870 constituted an "enlargement of the monopoly to cover the conversion of a work from one to another artistic medium." An Unhurried View of Copyright 32 (1967) (hereinafter Kaplan).

the author's rights in the book, see *Stowe* v. *Thomas*, 23 F. Cas. 201, 208 (No. 13,514) (CC ED Pa. 1853),[9] and it was not until after the passage of the 1909 Act that this Court first held that a copy of a literary work in another form than the original could infringe the author's copyright. See *Kalem Co.* v. *Harper Brothers*, 222 U. S. 55 (1911).[10]

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[9] "By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. . . . All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters [They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.] All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it, and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license, 'copies of her book.'" *Stowe* v. *Thomas*, 23 F. Cas., at 208 (footnote omitted).

It appears that at least as late as 1902, English copyright law also did not recognize that a dramatization could infringe an author's rights in a book. See E. MacGillivray, A Treatise Upon The Law of Copyright 114 (1902); see also *Reade* v. *Conquist*, 9 C. B. N. S. 755, 142 Eng. Rep. 297 (C. P. 1861); *Coleman* v. *Wathen*, 5 T. R. 245, 101 Eng. Rep. 137 (K. B. 1793). Even after the passage of the Act of 1870, one American commentator flatly declared: "Even if the public recitation of a book, in which copyright exists, is not made from memory, but takes the form of a public reading, from the work itself, of the whole or portions of it, this would not amount to an infringement of the author's copyright." 2 J. Morgan, Law of Literature 700–701 (1875).

[10] "The American cases reflect no recognition that unauthorized dramatization could infringe rights in a nondramatic work until the 1870 copyright revision provided authors with the same option to reserve dramatization rights that they were afforded with respect to translation. By then, dramatizations—like other derivative works—already had enjoyed almost a century of substantial independence. During this period, courts construing federal copyright statutes were willing to extend protection to them, but were reluctant to interfere with their unauthorized production." Jaszi 783.

See also Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. Copyright Society 209, 211–215 (1983).

The drafts of the copyright bill, considered by the Conferences held by the Register of Copyrights and the Librarian of Congress in 1905 and 1906,[11] had three distinctive features with respect to derivative works: They provided a limited period of protection from the creation of derivative works during which a derivative work could only be created with "the consent of the author or his assigns," 2 Brylawski & Goldman, Part D, p. LXV;[12] they distinguished between the copyright term for original works of authorship and for derivative works, according the latter a shorter period of protection;[13] and, finally, they provided that derivative works produced with the consent of the original author would be considered new works entitled to copyright. Together these provisions reveal a more complicated set of theoretical premises than is commonly acknowledged. Although originality of authorship was an essential precondition of copy-

[11] The history of the Copyright Act of 1909 is recounted in Justice Frankfurter's opinion for the Court in *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643, 652 (1943).

[12] The first draft of the copyright bill considered in 1905 provided that if the author or his assigns did not make or authorize to be made a dramatization within 10 years of the date of registration, the work could be used for dramatization by other authors. 2 Brylawski & Goldman, Part D, p. LXV. A similar provision appeared in the third draft of the bill considered by the Conference the following year, 3 *id.*, Part E, p. XL, and in the bill submitted by the Register of Copyrights to Congress. 1 *id.*, Part B, pp. 37–38. The provision was eventually dropped during hearings in Congress and was never adopted into law.

[13] The first draft provided identical terms for both original works of authorship and derivative works, 2 *id.*, Part D, pp. XXXVII–XXXVIII. Successive drafts gave the copyright in the original work to the author for his life plus 50 years, but limited the copyright in a derivative work to 50 years. 3 *id.*, Part E, pp. LIII–LIV; 1 *id.*, Part B, pp. 34–35. The single term was rejected at a late date by Congress and the final Act eventually provided the same two-term copyright for original and derivative works. See generally B. Ringer, Renewal of Copyright (1960), reprinted as Copyright Law Revision Study No. 31, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 115–121 (1961).

right, the duration of the copyright term and the extent of copyright protection rested upon the nature of the work as a whole rather than the original expression contributed by the copyright author. Moreover, the consent of the underlying author to the production of a derivative work was to be encouraged and, once given, entitled the derivative work to independence from the work upon which it was based.

The first two provisions were not included in the Copyright Act, which gave authors the right, during the full term of copyright, to create or consent to the creation of derivative works which would then enjoy their own copyright protection. But the third provision which set the conditions upon which an original author would consent and the second author would create a derivative work entitled to protection under the Copyright Act carried forward the view that the derivative copyright extended beyond the original contribution of the derivative author. Throughout the debates on the provision, the drafters of the Copyright Act evinced their understanding that the derivative copyright itself encompassed the whole derivative work. The first draft of § 7, considered by the second Conference in 1905, would have provided copyright as a new work for a derivative work "produced with the consent and authorization of the author of the original," without any restrictions on the effect of that copyright on the copyright in the original work. 2 Brylawski & Goldman, Part D, p. XXXII. By the time of the third Conference in 1906, the Register of Copyrights expressed his concern that that provision would be read too broadly, adding the proviso: "That the copyright thus secured shall not be construed to grant any exclusive right to such use of the original works, except as that may be obtained by agreement with the author or proprietor thereof." 3 *id.*, Part E, p. LI. The implication was that, in the absence of an agreement, the author of the derivative work would have, as a matter of copyright law, a nonexclusive right "to such use of the original works."

The final draft presented to Congress at the end of 1906 addressed a parallel problem that the license to use the underlying material might also detract from the rights of the underlying copyright if the derivative author did not adequately protect the material on which the copyright was subsisting. To allay this concern, the Register added the language "no such copyright shall affect the force or validity of any subsisting copyright upon the matter employed or any part thereof." 1 *id.*, Part B, p. 15.

Two significant changes were made during the congressional hearings from 1907 through 1909, but with those exceptions the provision survived intact. First, in response to the objection that the language of § 6, codified at 17 U. S. C. § 7 (1976 ed.), in conjunction with that of § 3, codified at 17 U. S. C. § 3 (1976 ed.), would be read to give the derivative work proprietor "a new term of copyright running on this old matter of his" and, in that way, provide for perpetual copyright, 4 Brylawski & Goldman, Part J, pp. 132–138 (statement of Mr. Porterfeld); see also *id.*, at 428, Congress limited the enforceability of the derivative copyright, adding language that publication of the dramatization would not "secure or extend copyright in such original works." § 6, 35 Stat. 1077. Second, in response to the objection that the Register's draft provision did not address with sufficient precision the possibility that failure of the derivative copyright would allow the underlying work to enter the public domain, Congress substituted the word "publication" for "copyright" in the "force or validity" clause. Congress thus made clear that it was the publication of the derivative work, not the copyright itself, that was not to "affect the force or validity of any subsisting copyright." *Ibid.*[14]

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[14] The amendment apparently emerged from dialogue between Mr. W. B. Hale, representative of the American Law Book Company, and Senator Smoot:

The legislative history confirms that the copyright in derivative works not only gives the second creative product the monopoly privileges of excluding others from the unconsented use of the new work, but also allows the creator to publish his or her own work product. The authority to produce the derivative work, which includes creative contributions by both the original author and the second artist, is dependent upon the consent of the proprietor of the underlying copyright. But once that consent has been obtained, and a derivative work has been created and copyrighted in accord with that consent, "a right of property spr[ings] into existence," *Edmonds* v. *Stern*, 248 F. 897, 898 (CA2 1918), that Congress intended to protect. Publication of the derivative work does not "affect the force or validity" of the underlying copyright except to the extent that it gives effect to the consent of the original proprietor. That owner—and in this case, the owner of a renewal of the original copyright—retains full dominion and control over all other means of exploiting that work of art, including the right to authorize other derivative works. The original copyright may have relatively little value because the creative contribution of the second artist is far more significant than the original con-

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"Mr. Hale: 'There is another verbal criticism I should like to make in section 6 of the Kittredge bill, which also relates to compilations, abridgments, etc.'

"The Chairman [Senator Smoot]. 'I think it is the same in the other bills.'

"Mr. Hale. 'Yes; it is the same in all the bills. I heartily agree with and am in favor of that section; but in line 12, in lieu of the words "but no such copyright shall effect the force or validity," etc., I would prefer to substitute these words: "and the publication of any such new work shall not affect the copyright," etc. . . . Under the act, as it stands now, it says the copyright shall not affect it. I would like to meet the case of a new compiled work, within the meaning of this clause, that is not copyrighted, or where, by reason of some accident the copyright fails. That should not affect the original copyrights in the works that have entered into and formed a part of this new compiled work. It does not change the intent of this section in any way.'" 5 Brylawski & Goldman, Part K, p. 78.

tribution, but that just means that the rewards for creativity are being fairly allocated between the two artists whose combined efforts produced the derivative work.

III

Nothing in § 24 requires a different result. The portion of that section dealing with copyright renewals provides:

> "[T]he author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, . . . shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright." 17 U. S. C. § 24 (1976 ed.).

That statute limits the renewal rights in a copyright to the specified statutory beneficiaries, "completely dissevering the title, breaking up the continuance . . . and vesting an absolutely new title eo nomine in the persons designated." *White-Smith Music Publishing Co.* v. *Goff*, 187 F. 247, 250 (CA1 1911). Since copyright is a creature of statute and since the statute gives the author only a contingent estate, with "the widow, widower, or children" as remaindermen, the author "ha[s] only an expectancy to assign" for the second term. *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373, 375 (1960). The original author may not sell more than he owns. He may not convey the second-term rights to print or copy the underlying work or to create additional derivative works from it. See *Gilliam* v. *American Broadcasting Cos.*, 538 F. 2d 14, 21 (CA2 1976); *G. Ricordi & Co.* v. *Paramount Pictures Inc.*, 189 F. 2d 469 (CA2), cert. denied, 342 U. S. 849 (1951).[15] Nor may the derivative author dedi-

[15] In *Ricordi*, the author of the derivative work not only produced a new derivative work, but also breached his covenant not to distribute the work, after the first term of the underlying copyright. As JUSTICE WHITE has

cate the underlying art to the public by failing to renew his copyright. See *Filmvideo Releasing Corp.* v. *Hastings*, 668 F. 2d 91, 93 (CA2 1981); *Russell* v. *Price*, 612 F. 2d 1123, 1128 (CA9 1979).[16] Even if the alienation of second-term rights would be in the author's best interest, providing funds when he is most in need, the restriction on sale of the corpus is a necessary consequence of Congress' decision to provide two terms of copyright.

Neither § 24 nor any other provision of the Act, however, expressly or by implication, prevents the author from exercising any of his other statutory rights during the original term of the copyright. The author of the underlying work may contract to sell his work at a bargain price during the original term of the copyright. That agreement would be enforceable even if performance of the contract diminished the value of the copyright to the owner of the renewal interest. Similarly, the original author may create and copyright his *own* derivative work; the right of an assignee or legatee to receive that work by assignment or bequest should not be limited by the interests of the owners of the renewal copyright in the underlying work. Section 1 of the Act, 17 U. S. C. § 1 (1976 ed.), gives the author the right to dramatize his own work without any apparent restriction. Such use might appear, at the time or in retrospect, to be improvident and a waste of the asset. Whatever harm the proprietor of the renewal copyright might suffer, however, is a consequence of the enjoyment by the author of the rights granted him by Congress.

The result should be no different when the author exercises his right to consent to creation of a derivative work by another. By designating derivative works as "new works"

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explained, "*Ricordi* merely held that the licensee of a copyright holder may not prepare a new derivative work based upon the copyrighted work after termination of the grant." *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 183, n. 7 (1985) (dissenting opinion).

[16] The result follows as well from the "force and validity" clause of § 7.

that are subject to copyright and accorded the two terms applicable to original works, Congress evinced its intention that the derivative copyright not lapse upon termination of the original author's interest in the underlying copyright. The continued publication of the derivative work, after the expiration of the original term of the prior work, does not infringe any of the statutory successor's rights in the renewal copyright of the original work. The author's right to sell his derivative rights is exercised when consent is conveyed and completed when the derivative work is copyrighted. At that point, prior to the end of the first term, the right to prevent publication of the derivative work is no longer one of the bundle of rights attaching to the copyright. The further agreement to permit use of the underlying material during the renewal term does not violate § 24 because at the moment consent is given and the derivative work is created and copyrighted, a new right of property comes into existence independent of the original author's copyright estate.

As an *ex post* matter, it might appear that the original author could have negotiated a better contract for his consent to creation of a derivative work, but Congress in § 24 was not concerned with giving an author a second chance to renegotiate his consent to the production of a derivative work.[17] It provided explicitly that, once consent was given, the derivative work was entitled as a matter of copyright law to treatment as a "new wor[k]." § 7. Ironically, by restricting the

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[17] Congress was primarily concerned with the ability of the author to exploit his *own* work of authorship:

"Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right." H. R. Rep. No. 2222, 60th Cong., 2d Sess., at 14.

author's ability to consent to creation of a derivative work with independent existence, the Court may make it practically impossible for the original author to sell his derivative rights late in the original term and to reap the financial and artistic advantage that comes with the creation of a derivative work.[18] Unless § 24 is to overwhelm § 7, the consent of the original author must be given effect whether or not it intrudes into the renewal term of the original copyright.

A putative author may sell his work to a motion picture company who will have greater use for it, by becoming an employee and making the work "for hire." The 1909 Act gave the employer the right to renew the copyright in such circumstances.[19] In addition, when an author intends that his work be used as part of a joint work, the copyright law gives the joint author common authority to exploit the underlying work and renew the copyright.[20] The Court today

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[18] The creation of a derivative work often is in the best interests of both the original author and his statutory successors. As one commentator has noted:

"The movie Rear Window became a selling point for anthologies containing the Woolrich story. The musical play Cats no doubt sent many people who dimly remembered the Love Song of J. Alfred Prufrock as the chief, if not the only oeuvre of T. S. Eliot to the bookstore for Old Possum's Book of Practical Cats." Weinreb, Fair's Fair: A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137, 1147 (1990).

[19] See 17 U. S. C. § 24 (1976 ed.) ("[I]n the case of . . . any work copyrighted by . . . an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years"). See also Ellingson, Copyright Exception for Derivative Works and the Scope of Utilization, 56 Ind. L. J. 1, 11 (1980–1981).

[20] See *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co.*, 161 F. 2d 406 (CA2 1946); *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. 2d 266 (CA2 1944). In the "12th Street Rag" case, *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co.*, 221 F. 2d 569 (CA2 1955), the Court of Appeals held that a work of music, intended originally to stand on its own as an instrumental, could become a joint work when it was later sold to a publisher who commissioned lyrics to be written for it. The decision, which would give the creator of the derivative work and the underlying au-

holds, however, that the independent entrepreneur, who does not go into the company's employ and who intends to make independent use of his work, does not also have the same right to sell his consent to produce a derivative work that can be distributed and publicly performed during the full term of its copyright protection. That result is perverse and cannot have been what Congress intended.[21]

The critical flaw in the Court's analysis is its implicit endorsement of the Court of Appeals reasoning that:

> "'If *Miller Music* makes assignment of the full renewal rights in the underlying copyright unenforceable when the author dies before effecting renewal of the copyright, then *a fortiori*, an assignment of part of the rights in the underlying work, the right to produce a movie version, must also be unenforceable if the author dies before effecting renewal of the underlying copyright.'" *Ante*, at 215–216.

That reasoning would be valid if the sole basis for the protection of the derivative work were the contractual assignment of copyright, but Woolrich did not just assign the rights to produce a movie version the way an author would assign the publisher rights to copy and vend his work. Rather, he expressed his consent to production of a derivative work under § 7. The possession of a copyright on a properly created derivative work gives the proprietor rights superior to those of

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thor a joint interest in the derivative work, accomplishes the same result that I believe § 7 does expressly.

[21] "The effect of the *Fred Fisher* [,318 U. S. 643 (1943),] case and other authorities is that if the author is dead when the twenty-eighth year comes round, the renewal reverts, free and clear, to his widow, children, and so forth in a fixed order of precedency; but if the author is alive in that year, the original sale holds and there is no reversion. The distinction is hard to defend and may operate in a peculiarly perverse way where on the faith of a transfer from the now-deceased author, the transferee has created a 'derivative work,' say a movie based on the original novel." Kaplan 112.

a mere licensee. As Judge Friendly concluded, this position is entirely consistent with relevant policy considerations.[22]

In my opinion, a fair analysis of the entire 1909 Act, with special attention to § 7, indicates that the statute embodied the same policy choice that continues to be reflected in the 1976 Act. Section 101 of the Act provides:

> "A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." 17 U. S. C. App. § 304(c)(6)(A).

I respectfully dissent.

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[22] "To such extent as it may be permissible to consider policy considerations, the equities lie preponderantly in favor of the proprietor of the derivative copyright. In contrast to the situation where an assignee or licensee has done nothing more than print, publicize and distribute a copyrighted story or novel, a person who with the consent of the author has created an opera or a motion picture film will often have made contributions literary, musical and economic, as great as or greater than the original author. As pointed out in the Bricker article [Bricker, Renewal and Extension of Copyright, 29 S. Cal. L. Rev. 23, 33 (1955)], the purchaser of derivative rights has no truly effective way to protect himself against the eventuality of the author's death before the renewal period since there is no way of telling who will be the surviving widow, children or next of kin or the executor until that date arrives. To be sure, this problem exists in equal degree with respect to assignments or licenses of underlying copyright, but in such cases there is not the countervailing consideration that large and independently copyrightable contributions will have been made by the transferee." *Rohauer* v. *Killiam Shows, Inc.*, 551 F. 2d 484, 493 (CA2), cert. denied, 431 U. S. 949 (1977).

UNITED STATES *v.* OJEDA RIOS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89–61. Argued February 28, 1990—Decided April 30, 1990

During a criminal investigation, the Government secured a series of court orders authorizing electronic surveillance of respondents, as mandated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.* Section 2518(8)(a) requires, in pertinent part, that: (1) recording "shall be done in such way as will protect the recording from editing or other alterations"; (2) "[i]mmediately upon the expiration of the period of the order, or extensions thereof," the recordings are to be made available to the judge who issued the order and sealed under his directions; and (3) "[t]he presence of the seal . . . or a satisfactory explanation" for its absence is a prerequisite for the use or disclosure of the evidence obtained from the recordings. Among the orders obtained, was an April 27, 1984, order for the surveillance of respondent Ojeda Rios' Levittown, Puerto Rico, residence and some nearby public telephones, which was extended until July 23, when he moved to another community. On July 27, the Government obtained a new order covering his new home, which, with extensions, expired on September 24. On October 13, three days after the expiration of an order authorizing surveillance of Ojeda Rios' car, all of the Ojeda Rios tapes were sealed. The Government also obtained an order authorizing it to wiretap two public telephones in Vega Baja, effective January 18, 1985, but that order expired on February 17. A new order, issued on March 1, expired on May 30, and the Vega Baja tapes were sealed on June 15. After they were indicted for various offenses, respondents moved to suppress the evidence obtained as a result of, *inter alia*, these wiretaps. The District Court suppressed the Levittown and Vega Baja tapes based solely on a delay in their sealing. The court found that the July 27 order authorizing the wiretap of Ojeda Rios' new residence was not an extension of the Levittown order, and therefore there was at least an 82-day delay—starting July 23—in sealing the Levittown tapes. Similarly, the March 1 Vega Baja order could not be considered an extension of the January 18 order, because of the delay in seeking the extension and the Government's failure to satisfactorily explain the delay. Thus, there was a 118-day delay in the sealing of those tapes. The Court of Appeals affirmed.

Held:

1. Section 2518(8)(a) applies to a delay in sealing as well as to a complete failure to seal tapes. Its primary thrust is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance, and the sealing requirement is important precisely because it limits the Government's opportunity to alter the recordings. The narrow reading suggested by the Government—that since tapes must either bear a seal or the Government must provide a "satisfactory explanation" for the seal's "absence," the "satisfactory explanation" requirement does not apply where the tapes actually bear a seal, regardless of when or why the seal was applied—is not a plausible interpretation of congressional intent, since § 2518(8)(a) requires not just any seal but one that has been obtained *immediately* upon expiration of the underlying surveillance order. The Government's view would create the anomalous result that the prosecution could delay requesting a seal for months without risking a substantial penalty. Pp. 262–264.

2. The "satisfactory explanation" language requires that the Government explain not only why a delay occurred but also why it is excusable. The Government's submission—that the requirement is satisfied if it first explains *why* the delay occurred and then demonstrates that the tapes are authentic—would nullify the requirement's function as a safeguard against tampering and is foreclosed by the provision's plain words. The fact that the Government has an incentive to seal tapes immediately to avoid lengthy pretrial suppression hearings is no more than a statement that only rarely would there be a delay and does not answer the issue posed where there is a delay that is not satisfactorily explained. Moreover, the argument is suspect since early sealing does not foreclose a challenge to authenticity, which would also require lengthy proceedings. Pp. 264–265.

3. This case is remanded for a determination whether the Government's explanation to the District Court substantially corresponds to the one it now advances: that the delays were the result of a good-faith, objectively reasonable misunderstanding of the statutory term "extension," based on the supervising attorney's interpretation of two Circuit cases which he believed indicated that the Government was not required to seek sealing until there was a meaningful hiatus in the investigation as a whole. Those cases support the conclusion that this theory was an objectively reasonable, although incorrect, interpretation of the law at the time of the delays, and to the extent that the Court of Appeals required the Government to prove that its interpretation of the law was absolutely correct, it held the Government to too strict a standard. Nonetheless, the explanation is not "satisfactory" within the meaning of the statute unless it was actually advanced at the suppression hearing to ex-

plain the delays, a question not addressed by the Court of Appeals. Pp. 265–267.

875 F. 2d 17, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 267. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 268.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Harriet S. Shapiro*, and *Patty Merkamp Stemler*.

Richard A. Reeve, by appointment of the Court, 493 U. S. 1015, argued the cause for respondents. With him on the brief were *Diane Polan*, *John R. Williams*, *Michael E. Deutsch*, *Ronald L. Kuby*, and *Margaret P. Levy*.*

JUSTICE WHITE delivered the opinion of the Court.

This case arises under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), as amended, 18 U. S. C. §2510 *et seq.*, which regulates the interception of wire, oral, and electronic communications. Except under extraordinary circumstances, see §2518(7), electronic surveillance may be conducted only pursuant to a court order. See §§2518(1)–(6). Section 2518(8)(a) requires that "[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device" and that recording "shall be done in such way as will protect the recording from editing or other alterations." The section further provides that "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing

*Briefs of *amici curiae* urging affirmance were filed for the Asian-American Legal Defense and Education Fund et al. by *David D. Cole*; and for the National Association of Criminal Defense Lawyers by *Robert Glass*.

such order and sealed under his directions." Section 2518(8)(a) has an explicit exclusionary remedy[1] for noncompliance with the sealing requirement, providing that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517."[2]

In this case, a series of court orders authorized electronic surveillance. The tapes later offered in evidence bore seals but the seals on the tapes at issue had not been immediately attached as required by the statute. The issue we address is whether § 2518(8)(a) requires suppression of those tapes.

Respondents are members of a Puerto Rican organization known as Los Macheteros (the "machete wielders"). All have been charged with federal crimes relating to the robbery in 1983 of a Wells Fargo depot in Connecticut, a robbery which netted approximately $7 million. The Government first began investigating respondents in connection with a rocket attack on the United States Courthouse in Hato Rey, Puerto Rico. Effective April 27, 1984, the Government obtained an order of electronic surveillance for the residence of Filiberto Ojeda Rios in Levittown, Puerto Rico, and for some public telephones near the residence. During its investigation of the rocket attack, the Government discovered evi-

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[1] Title III also contains a general suppression remedy, not applicable in this case, that provides for suppression when electronic communications have been unlawfully intercepted, were intercepted pursuant to a court order that is facially invalid, or were not intercepted in conformity with the order of authorization. See 18 U. S. C. § 2518(10).

[2] Section 2517(3) provides that "[a]ny person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof."

dence indicating that respondents had been involved in the Wells Fargo depot robbery. The Government obtained two extensions of the April 27 surveillance order, with the final extension expiring on July 23, 1984. The Government actually terminated surveillance at the Levittown residence and public telephones on July 9, 1984, when Ojeda Rios moved to an apartment in El Cortijo, a community adjacent to Levittown. On July 27, 1984, the Government obtained a new surveillance order covering Ojeda Rios' El Cortijo residence. After extensions, that order expired on September 24, 1984. Another surveillance order authorizing surveillance of Ojeda Rios' car, originally entered on May 11, 1984, was extended and finally expired on October 10, 1984. All tapes created during the surveillance of Ojeda Rios were sealed by the United States District Court for the District of Puerto Rico on October 13, 1984.

As part of the Wells Fargo robbery investigation, the Government obtained a court order on November 1, 1984, authorizing it to wiretap a residence shared by Juan Segarra Palmer and Luz Berrios Berrios in Vega Baja, Puerto Rico. The District Court extended that authorization order each month for seven months, with the last extension expiring on May 30, 1985. The Government also obtained a court order authorizing it to wiretap two public telephones in Vega Baja, effective January 18, 1985. That order expired on February 17, 1985, and due to difficulties in finishing the affidavit necessary to obtain an extension, the Government did not apply for an extension until March 1, 1985. The District Court issued a new order on that date. The order was thereafter extended twice and finally expired on May 30, 1985. All tapes from the Vega Baja wiretaps were judicially sealed on June 15, 1985.

After respondents were indicted for various offenses relating to the Wells Fargo depot robbery, they moved to suppress all evidence the Government had obtained as a result of electronic surveillance. Following a suppression hearing,

the United States District Court for the District of Connecticut refused to suppress the El Cortijo and Vega Baja residence tapes, but suppressed the Levittown tapes and the public telephone tapes made in Vega Baja. 695 F. Supp. 649 (1988). In doing so, the District Court determined that the July 27, 1984, order authorizing the wiretap at the El Cortijo residence was not an extension of the April 27, 1984, order authorizing the Levittown wiretaps and, therefore, the obligation to seal the Levittown tapes arose when the last extension of the April 27 order expired on July 23, 1984. The court calculated that there had been at least an 82-day delay in sealing the Levittown tapes. With respect to the public telephone wiretaps in Vega Baja, the court determined that the March 1, 1985, order could not be considered an extension of the initial January 18, 1985, order—which had expired on February 17, 1985—because of the 12-day delay in seeking reauthorization of the January 18 order and the Government's failure to satisfactorily explain that delay. The court calculated that the sealing of the tapes on June 15, 1985, occurred 118 days after the order which authorized the surveillance had expired. Without determining the authenticity of these two sets of tapes, the District Court suppressed them on the basis of the delay alone.

The United States Court of Appeals for the Second Circuit affirmed the suppression of the tapes, 875 F. 2d 17 (1989), rejecting the Government's explanation for the sealing delays. Because the scope and role of the sealing provision of Title III has generated disagreement in the lower courts, we granted certiorari, 493 U. S. 889 (1989), and now vacate and remand.

The Government first argues that because § 2518(8)(a) states that as a prerequisite to admissibility, electronic surveillance tapes must either bear a seal or the Government must provide a "satisfactory explanation" for the "absence" of a seal, the "satisfactory explanation" requirement does not apply where the tapes to be offered in evidence actually bear

a seal, regardless of when or why the seal was applied. This argument is unpersuasive. The narrow reading suggested by the Government is not a plausible interpretation of congressional intent when the terms and purpose of § 2518(8)(a) are considered as a whole. The section begins with the command that tapes shall be sealed "immediately" upon expiration of the underlying surveillance order and then, prior to the clause relied upon by the Government, provides that "the seal *provided for by this subsection*" (emphasis added) is a prerequisite to the admissibility of electronic surveillance tapes. The clear import of these provisions is that the seal required by § 2518(8)(a) is not just any seal but a seal that has been obtained *immediately* upon expiration of the underlying surveillance order. The "absence" the Government must satisfactorily explain encompasses not only the total absence of a seal but also the absence of a timely applied seal. Contrary to what is so plainly required by § 2518(8)(a), the Government would have us nullify the immediacy aspect of the sealing requirement.

The primary thrust of § 2518(8)(a), see S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968), and a congressional purpose embodied in Title III in general, see, *e. g.*, *United States* v. *Giordano*, 416 U. S. 505, 515 (1974), is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.

The Government's view of the statute would create the anomalous result that the prosecution could delay requesting a seal for months, perhaps even until a few days before trial, without risking a substantial penalty. Since it is likely that a

district court would automatically seal the tapes,[3] there would be no "absence" of a seal, in the sense suggested by the Government, and § 2518(8)(a) would not come into play, even though the tapes would have been exposed to alteration or editing for an extended period of time. Such a view of the statute ignores the purposes of the sealing provision and is too strained a reading of the statutory language to withstand scrutiny. Like every Court of Appeals that has considered the question, we conclude that § 2518(8)(a) applies to a delay in sealing, as well as to a complete failure to seal, tapes.[4]

The Government's second contention is that even if § 2518 (8)(a)'s "satisfactory explanation" requirement applies to delays in sealing tapes, it is satisfied if the Government first explains *why* the delay occurred and then demonstrates that the tapes are authentic. This submission, however, also is not a sensible construction of the language of § 2518(8)(a) and would essentially nullify the function of the sealing requirement as a safeguard against tampering. The statute requires a *satisfactory* explanation, not just an explanation. It is difficult to imagine a situation in which the Government could not explain *why* it delayed in seeking to have tapes sealed. Even deliberate delay would be enough, so long as the Government could establish the integrity of the tapes; yet deliberate delay could hardly be called a satisfactory explanation. To hold that proof of nontampering is a substitute for a

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[3] Nothing in § 2518(8)(a) itself clearly indicates whether district courts have any authority or discretion to deny a governmental request for sealing. The Government suggested at oral argument that district courts may have such authority but did not indicate that, if so, they have ever exercised it. Tr. of Oral Arg. 9. Respondents' countered that under the statute district courts have a mandatory duty to seal tapes, regardless of the timing of the request. *Id.*, at 36–37, 47.

[4] See, *e. g.*, *United States* v. *Gigante*, 538 F. 2d 502, 506–507 (CA2 1976); *United States* v. *Johnson*, 225 U. S. App. D. C. 33, 42, 696 F. 2d 115, 124 (1982); *United States* v. *Massino*, 784 F. 2d 153, 156 (CA2 1986); *United States* v. *Mora*, 821 F. 2d 860, 864–865 (CA1 1987).

satisfactory explanation is foreclosed by the plain words of the sealing provision.

It is true that offering to prove that tapes are authentic would be consistent with Congress' concern about tampering,[5] but even if we were confident that tampering could always be easily detected, we would not be at liberty to agree with the Government, for it is obvious that Congress had another view when it imposed the sealing safeguard.

The Government contends that it has an incentive to seal tapes immediately because otherwise, even under its proposed test, it will face lengthy pretrial suppression hearings in which it must establish the authenticity of tape recorded conversations. This is no more than a statement that only rarely would there be a delay and does not answer the issue posed where there is a delay that is not satisfactorily explained. Furthermore, the incentive argument is suspect since timely sealing, as the Government concedes, Tr. of Oral Arg. 10–11, 22–23, does not foreclose a challenge to authenticity, which in any event would require lengthy proceedings.

We conclude that the "satisfactory explanation" language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable. This approach surely is more consistent with the language and purpose of § 2518(8)(a).

Finally, we must consider whether the Government established good cause for the sealing delays that occurred in this case. The Government contends in this Court that its delays were the result of a good-faith, objectively reasonable misunderstanding of the statutory term "extension." According to

[5] It also is true that some Courts of Appeals have agreed with the Government in this respect. See, *e. g.*, *United States* v. *Falcone*, 505 F. 2d 478, 484 (CA3 1974); *United States* v. *Sklaroff*, 506 F. 2d 837, 840–841 (CA5 1975); *United States* v. *Cohen*, 530 F. 2d 43, 46 (CA5 1976); *United States* v. *Lawson*, 545 F. 2d 557, 564 (CA7 1975); *United States* v. *Diadone*, 558 F. 2d 775, 780 (CA5 1977); *McMillan* v. *United States*, 558 F. 2d 877, 878–879 (CA8 1977); *United States* v. *Angelini*, 565 F. 2d 469, 471–473 (CA7 1977). As explained above, we read § 2518(8)(a) differently.

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the Government, the attorney supervising the investigation and electronic surveillance of respondents believed that he was not required to seek sealing of the tapes until there was a meaningful hiatus in the investigation as a whole. In arguing that this understanding of the law was objectively reasonable, the Government relies primarily on two Second Circuit cases interpreting the statutory term "extension."

In one case, the Second Circuit held that an electronic surveillance order that was entered at least 16 days after a prior order had expired was to be regarded as an "extension" within the meaning of § 2518 because it "was clearly part of the same investigation of the same individuals conducting the same criminal enterprise" as was being investigated under the prior order. *United States* v. *Principie*, 531 F. 2d 1132, 1142, and n. 14 (1976), cert. denied, 430 U. S. 905 (1977). In a subsequent case, again involving a gap between the expiration of an order and an "extension," the court indicated that under the circumstances presented later orders could be deemed extensions of prior ones and stated that where an "intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance." *United States* v. *Scafidi*, 564 F. 2d 633, 641 (1977), cert. denied, 436 U. S. 903 (1978).

These cases do not establish that the Government's asserted understanding of the law in this case was correct; indeed, the Second Circuit's decision in this case indicates the contrary, but the cases do support the conclusion that the "extension" theory now pressed upon us was objectively reasonable at the time of the delays. Thus, we conclude that the excuse now advanced by the Government is objectively reasonable. In establishing a reasonable excuse for a sealing delay, the Government is not required to prove that a particular understanding of the law is correct but rather only that its interpretation was objectively reasonable at the time. To the extent the Second Circuit in this case required an ab-

solutely correct interpretation of the law, we think it held the Government to too strict a standard.

Nevertheless, we must remand this case for further proceedings. A "satisfactory explanation" within the meaning of § 2518(8)(a) cannot merely be a reasonable excuse for the delay presented at the appellate level. Rather, our review of the sufficiency of the Government's explanation for a delay should be based on the evidence presented and submissions made in the District Court. Therein lies the problem in this case. Whether the supervising attorney actually advanced the Government's "extension" theory in the District Court is not clear. Compare App. 4–5 (no sealing required for an ongoing investigation until a "meaningful hiatus" occurred), and *id.*, at 26–27 (same), with *id.*, at 36 (separate orders viewed as extensions of an interrelated investigation), and *id.*, at 40 (same). Thus, even though the misunderstanding now pressed by the Government was objectively reasonable, that explanation is not "satisfactory" within the meaning of the statute unless it was relied on at the suppression hearing to explain the sealing delays. Because the Second Circuit did not address this threshold question, the case must be remanded for a determination whether the Government's explanation to the District Court substantially corresponds to the explanation it now advances.

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion on the understanding that a "satisfactory explanation" within the meaning of 18 U. S. C. § 2518(8)(a) cannot merely be a reasonable excuse for the delay; it must also reflect the actual reason for the delay. Thus, as the Court today holds, an appellate court's review of

the sufficiency of the Government's explanation for a delay should be based on the findings made and evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal. See *ante*, at 267. With this understanding, I agree with the Court that this case should be remanded for a determination whether the Government's explanation to the District Court for the delay—not the explanation offered on appeal—meets the "satisfactory explanation" standard.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The failure to comply with the sealing requirements of Title III was the unfortunate consequence of a Government lawyer's good-faith, but incorrect, understanding of the law. Whether such a mistake should constitute a "satisfactory explanation" for the failure, is, as both the District Court and the Court of Appeals recognized, a close question. Both of those courts resolved their doubts in favor of requiring strict compliance with a statute that was carefully drawn to protect extremely sensitive privacy interests. I think their resolution of the issue was correct.[1]

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[1] The Court acknowledges that the prosecutor's understanding of the law was incorrect. *Ante*, at 266. However, the Court posits that, at the time of this investigation, it was "objectively reasonable" to interpret 18 U. S. C. § 2518(8)(a) to treat wiretap orders issued after an order covering the same suspects or locations expired as extensions of the earlier order. The legal sufficiency of this excuse, which relies on *United States* v. *Principie*, 531 F. 2d 1132 (CA2 1976), cert. denied, 430 U. S. 905 (1977), and *United States* v. *Scafidi*, 564 F. 2d 633 (CA2 1977), cert. denied, 436 U. S. 903 (1978), is debatable for three reasons.

First, *Principie* addressed a different provision of Title III, § 2518(8)(d), which requires written notice to suspects within 90 days of "the termination of the period of an order or extensions thereof." The *Principie* court treated a wiretap order that was issued four days after the expiration of an order directed at the same suspects at a previous location to be "an extension" within the meaning of this section. While enforcing notice under § 2518(8)(d) is informed by concerns for prematurely exposing an investiga-

The ordinary citizen is often charged with presumptive knowledge of laws even when they are complex and confusing. A similar presumption should apply to a federal prosecutor responsible for insuring that a prolonged and extensive program of electronic surveillance is conducted in compliance with the law. Moreover, when issues turn on the details of such an investigation—in this case involving 1,011 tapes made pursuant to 8 separate orders and 17 extensions—I believe we should give special deference to the consistent evaluations of the record by the District Court and the Court of Appeals. Chief Judge Oakes succinctly stated the concern that is decisive for me:

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tion, sealing under § 2518(8)(a) carries no such risk. To the contrary, the underlying concern for the integrity of tapes and accurate recordkeeping supports sealing as early as possible. The *Scafidi* court applied *Principie*'s definition of extension to a sealing delay, but held alternatively that if the later orders could not be considered extensions, the reasons for the brief delay met the rigorous reading of § 2518(8)(a) established in *United States* v. *Gigante*, 538 F. 2d 502 (CA2 1976).

Second, because a judge of the United States District Court for the District of Puerto Rico issued the surveillance and sealing orders, the District Court below held that the "law of the first circuit controlled where a material difference exists between the sealing requirements in the first and second circuits." *United States* v. *Gerena*, 695 F. Supp. 649, 657–658 (Conn. 1988). The First Circuit has not applied *Principie* to subsequent orders in Title III notice or sealing cases. It has construed § 2518(8)(a)'s sealing requirement strictly and identified a series of factors to measure the sufficiency of an explanation of delay. *United State* v. *Mora*, 821 F. 2d 860 (CA1 1987). Both the District Court and Second Circuit used the *Mora* factors in sustaining the suppression of the Levittown and Baja Vega tapes. 695 F. Supp., at 657–658; 875 F. 2d 17, 22–23 (CA2 1989).

Finally, the general rule—as stated in the treatise used by the prosecutor in this case—is that "[a]lthough Title III delays the sealing and notice deadline when the initial warrant is extended, it does not postpone those deadlines when a new warrant is obtained on a different phone or premises." C. Fishman, Wiretapping and Eavesdropping § 190 (1978); *id.*, at 282, n. 8 (acknowledging *Principie* as an exception to *notice* deadlines in a footnote). Prosecutor Bove did not recall what cases he consulted, but did recall using the Fishman treatise. App. 35, 40, 42–44.

> "We think that unfortunately the failure to seal the Levittown tapes here resulted from a disregard of the sensitive nature of the activities undertaken. The danger here is, of course, that today's dereliction becomes tomorrow's conscious avoidance of the requirements of law. The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law." 875 F. 2d 17, 23 (CA2 1989).[2]

Accordingly, while I agree with the Court's rejection of the Government's construction of § 2518(8)(a), I would affirm the judgment of the Court of Appeals.[3]

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[2] Cf. *United States* v. *Giordano*, 416 U. S. 505, 527 (1974) ("Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device").

[3] If a "satisfactory explanation" *did* exist, I would agree that a remand to determine that it was in fact "the actual reason for the delay" would be required. *Ante*, at 267 (O'CONNOR, J., concurring).

CALIFORNIA *v.* AMERICAN STORES CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-258. Argued January 16, 1990—Decided April 30, 1990

Shortly after respondent American Stores Co., the fourth largest supermarket chain in California, acquired all of the outstanding stock of the largest chain, the State filed suit in the District Court alleging, *inter alia*, that the merger constituted an anticompetitive acquisition violative of § 7 of the Clayton Act and would harm consumers throughout the State. The court granted the State a preliminary injunction requiring American to operate the acquired stores separately pending resolution of the suit. Although agreeing that the State had proved a likelihood of success on the merits and the probability of irreparable harm, the Court of Appeals set aside the injunction on the ground that the relief granted exceeded the District Court's authority under § 16 of the Act to order "injunctive relief." The court relied on an earlier decision in which it had concluded on the basis of its reading of excerpts from subcommittee hearings that § 16's draftsmen did not intend to authorize the remedies of "dissolution" or "divestiture" in private litigants' actions. Thus, held the court, the "indirect divestiture" effected by the preliminary injunction was impermissible.

Held: Divestiture is a form of "injunctive relief" authorized by § 16. Pp. 278-296.

(a) The plain text of § 16—which entitles "[a]ny person . . . to . . . have injunctive relief . . . against threatened loss or damage . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity"—authorizes divestiture decrees to remedy § 7 violations. On its face, the simple grant of authority to "have injunctive relief" would seem to encompass that remedy just as plainly as the comparable language in § 15 of the Act, which authorizes the district courts to "prevent and restrain violations" in antitrust actions brought by the United States, and under which divestiture is the preferred remedy for illegal mergers. Moreover, § 16 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek or a court may order, but, rather, evidences Congress' intent that traditional equitable principles govern the grant of such relief. The section's "threatened loss or damage" phrase does not negate the court's power to order divestiture. Assuming, as did the lower courts, that the merger in question violated the

antitrust laws, and that the conduct of the merged enterprise threatens economic harm to consumers, such relief would prohibit that conduct from causing that harm. Nor does the section's "threatened conduct that will cause loss or damage" phrase limit the court's power to the granting of relief against anticompetitive "conduct," as opposed to "structural relief," or to the issuance of prohibitory, rather than mandatory, injunctions. That phrase is simply a part of the general reference to the standards that should be applied in fashioning injunctive relief. Section 16, construed to authorize a private divestiture remedy, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger. Pp. 278–285.

(b) The legislative history does not require that § 16 be construed narrowly. American's reliance on the subcommittee hearing excerpts cited by the Court of Appeals and on *Graves* v. *Cambria Steel Co.*, 298 F. 761—each of which contains statements indicating that private suits for *dissolution* do not lie under § 16—is misplaced. At the time of the Act's framing, dissolution was a vague and ill-defined concept that encompassed the drastic remedy of corporate termination as well as divestiture. Thus, the fact that Congress may have excluded the more severe sanction does not imply that the equitable formulation of § 16 cannot permit divestiture. Since the inferences that American draws simply are not confirmed by anything else in the legislative history or contemporaneous judicial interpretation, § 16 must be taken at its word when it endorses the "conditions and principles" governing injunctive relief in equity courts. There being nothing in the section that restricts courts' equitable jurisdiction, the provision should be construed generously and flexibly to enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful stock purchase. Pp. 285–295.

(c) Simply because a district court has the power to order divestiture in appropriate § 16 cases does not mean that it should do so in every situation in which the Government would be entitled to such relief under § 15. A private litigant must establish standing by proving "threatened loss or damage" to his own interests, and his suit may be barred by equitable defenses such as laches or "unclean hands." Pp. 295–296.

872 F. 2d 837, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 296.

H. Chester Horn, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs

were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Michael J. Strumwasser*, Special Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, and *Lawrence R. Tapper* and *Ernest Martinez*, Deputy Attorneys General.

Rex E. Lee argued the cause for respondents. With him on the brief were *Carter G. Phillips*, *Mark D. Hopson*, *Donald B. Holbrook*, and *Kent T. Anderson*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, *Allene D. Evans*, Assistant Attorney General, and *Donna L. Nelson*, Assistant Attorney General, *Don Siegelman*, Attorney General of Alabama, and *Walter S. Turner*, Chief Assistant Attorney General, *Douglas B. Baily*, Attorney General of Alaska, and *Thomas E. Wagner*, Assistant Attorney General, *John Steven Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Clarine Nardi Riddle*, Attorney General of Connecticut, and *Robert M. Langer*, Assistant Attorney General, *Robert A. Butterworth*, Attorney General of Florida, and *Jerome W. Hoffman*, Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, and *Robert A. Marks* and *Ted Gamble Clause*, Deputy Attorneys General, *Jim Jones*, Attorney General of Idaho, and *Catherine K. Broad*, Deputy Attorney General, *Neil F. Hartigan*, Attorney General of Illinois, *Robert Ruiz*, Solicitor General, and *Christine H. Rosso*, Senior Assistant Attorney General, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General, *James E. Tierney*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Michael F. Brockmeyer* and *R. Hartman Roemer*, Assistant Attorneys General, *James M. Shannon*, Attorney General of Massachusetts, and *George K. Weber* and *Thomas M. Alpert*, Assistant Attorneys General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Deputy Attorney General, *Thomas F. Pursell*, Assistant Attorney General, and *James P. Spencer*, Special Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, and *J. Kenneth Creighton*, Deputy Attorney General, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solic-

JUSTICE STEVENS delivered the opinion of the Court.

By merging with a major competitor, American Stores Co. (American) more than doubled the number of supermarkets that it owns in California. The State sued, claiming that the merger violates the federal antitrust laws and will harm consumers in 62 California cities. The complaint prayed for a preliminary injunction requiring American to operate the acquired stores separately until the case is decided, and then to divest itself of all of the acquired assets located in California. The District Court granted a preliminary injunction preventing American from integrating the operations of the two companies. The Court of Appeals for the Ninth Circuit agreed with the District Court's conclusion that California had made

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itor General, and *Lloyd E. Constantine*, Assistant Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Eugene F. Waye*, Chief Deputy Attorney General, and *Carl S. Hisiro*, Senior Deputy Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, and *Edmund F. Murray, Jr.*, Special Assistant Attorney General, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Jeffrey P. Hallem*, Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, and *Perry Craft*, Deputy Attorney General, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Julie Brill*, Assistant Attorney General, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Carol A. Smith*, Assistant Attorney General, *Roger W. Tompkins*, Attorney General of West Virginia, *Daniel N. Huck*, Deputy Attorney General, and *Robert William Schulenberg III*, Senior Assistant Attorney General, and *Joseph B. Meyer*, Attorney General of Wyoming; and for the Center for Public Interest Law by *Robert C. Fellmeth*.

Briefs of *amici curiae* urging affirmance were filed for the Business Roundtable by *Thomas B. Leary* and *Janet L. McDavid;* for the California Retailers Association et al. by *Theodore B. Olson, James R. Martin, Phillip H. Rudolph*, and *Adrian A. Kragen;* and for the United Food and Commercial Workers International Union et al. by *George R. Murphy, Nicholas W. Clark, Robert W. Gilbert, Laurence D. Steinsapir*, and *D. William Heine*.

an adequate showing of probable success on the merits, but held that the relief granted by the District Court exceeded its authority under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U. S. C. § 26. In its view, the "injunctive relief . . . against threatened loss or damage" authorized by § 16 does not encompass divestiture, and therefore the "indirect divestiture" effected by the preliminary injunction was impermissible. 872 F. 2d 837 (1989). We granted certiorari to resolve a conflict in the Circuits over whether divestiture is a form of injunctive relief within the meaning of § 16. 493 U. S. 916 (1989). We conclude that it is.

I

American operates over 1,500 retail grocery stores in 40 States. Prior to the merger, its 252 stores in California made it the fourth largest supermarket chain in that State. Lucky Stores, Inc. (Lucky), which operated in seven Western and Midwestern States, was the largest, with 340 stores. The second and third largest, Von's Companies and Safeway Stores, were merged in December 1987. 697 F. Supp. 1125, 1127 (CD Cal. 1988); Pet. for Cert. 3.

On March 21, 1988, American notified the Federal Trade Commission (FTC) that it intended to acquire all of Lucky's outstanding stock for a price of $2.5 billion.[1] The FTC conducted an investigation and negotiated a settlement with American. On May 31, it simultaneously filed both a complaint alleging that the merger violated § 7 of the Clayton Act and a proposed consent order disposing of the § 7 charges subject to certain conditions. Among those conditions was a requirement that American comply with a "Hold Separate Agreement" preventing it from integrating the two companies' assets and operations until after it had divested itself of

[1] See 15 U. S. C. § 18a (Hart-Scott-Rodino Antitrust Improvements Act of 1976).

several designated supermarkets.[2] American accepted the terms of the FTC's consent order. In early June, it acquired and paid for Lucky's stock and consummated a Delaware "short form merger." 872 F. 2d, at 840; Brief for Respondents 2. Thus, as a matter of legal form American and Lucky were merged into a single corporate entity on June 9, 1988, but as a matter of practical fact their business operations have not yet been combined.

On August 31, 1988, the FTC gave its final approval to the merger. The next day California filed this action in the United States District Court for the Central District of California. The complaint alleged that the merger violated § 1 of the Sherman Act, 15 U. S. C. § 1, and § 7 of the Clayton Act, 15 U. S. C. § 18, and that the acquisition, "if consummated," would cause considerable loss and damage to the State: Competition and potential competition "in many relevant geographic markets will be eliminated," App. 61, and "the prices of food and non-food products might be increased." *Id.*, at 62. In its prayer for relief, California sought, *inter alia*, (1) a preliminary injunction "requiring American to hold and operate separately from American all of Lucky's California assets and businesses pending final adjudication of the merits"; (2) "such injunctive relief, including rescission . . . as is necessary and appropriate to prevent the effects" alleged in the complaint; and (3) "an injunction requiring American to divest itself of all of Lucky's assets and businesses in the State of California." *Id.*, at 65, 66–67.

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[2] Among other requirements, the Hold Separate Agreement obligated American to maintain separate books and records for the acquisition; to prevent any waste or deterioration of the acquired company's California operation; to refrain from replacing the company's executives; to assure that it is maintained as a viable competitor in California; to refrain from selling or otherwise disposing of the acquired company's warehouse, distribution or manufacturing facilities, or any retail grocery stores in California; and to preserve separate purchasing for its retail grocery sales. 697 F. Supp. 1125, 1134 (CD Cal. 1988).

The District Court granted California's motion for a temporary restraining order and, after considering extensive statistical evidence, entered a preliminary injunction. Without reaching the Sherman Act claim, the court concluded that the State had proved a prima facie violation of § 7 of the Clayton Act. On the question of relief, the District Court found that the State had made an adequate showing "that Californians will be irreparably harmed if the proposed merger is completed," 697 F. Supp., at 1134, and that the harm the State would suffer if the merger was not enjoined "far outweighs" the harm that American will suffer as the result of an injunction. *Id.*, at 1135. The court also rejected American's argument that the requested relief was foreclosed by a prior decision of the Court of Appeals for the Ninth Circuit holding that divestiture is not a remedy authorized by § 16 of the Clayton Act. American contended that the proposed injunction was "tantamount to divestiture" since the merger of the two companies had already been completed, but the District Court disagreed. It held that since the FTC's Hold Separate Agreement was still in effect, the transaction was not a completed merger.[3]

American filed an interlocutory appeal pursuant to 28 U. S. C. § 1292(a)(1). The Court of Appeals for the Ninth Circuit first held that the District Court had not abused its discretion in finding that California had proved a likelihood of success on the merits and the probability of irreparable harm. Nevertheless, on the authority of its earlier decision in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F. 2d 913 (1975) *(IT&T)*,

[3] The District Court observed that because the Hold Separate Agreement was still in effect, "this is *not* a completed merger. [American] and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities." The court stated that only by completing a "linguistic triathalon" could one conclude that an injunction stopping such a merger was "tantamount to divestiture." 697 F. Supp., at 1134.

it set aside the injunction. The Court of Appeals reasoned that its own prior decisions established both that "'divestiture is not an available remedy in private actions under § 16 of the Clayton Act,'" and that "section 16 does not permit indirect divestiture, that is, an injunction which on its face does not order divestiture but which has the same effect. *IT&T*, 518 F. 2d at 924." 872 F. 2d, at 844. The Court of Appeals applied this rule to conclude that the injunction issued by the District Court was legally impermissible. Observing that under the injunction "these stores must operate as if Lucky had never been acquired by American Stores at all," the Court of Appeals held that "[s]uch an injunction requires indirect divestiture." *Id.*, at 845. Finally, the Court of Appeals added that the District Court had "compounded its misapprehension of the law of divestiture" by misunderstanding "the legal status of the merger." Specifically, the District Court erred by concluding that the "FTC's consent order" undid "the legal effect of this merger" which "had already taken place" according to Delaware corporation law. *Ibid.*

On California's application, JUSTICE O'CONNOR entered a stay continuing the District Court's injunction pending further review by this Court. 492 U. S. 1301 (1989). We then granted certiorari to resolve the conflict between this decision and the earlier holding of the Court of Appeals for the First Circuit in *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F. 2d 404 (1985). We now reverse.

II

In its *IT&T* opinion, the Court of Appeals for the Ninth Circuit reasoned that the term "injunctive relief" as used in § 16 is ambiguous and that it is necessary to review the statute's legislative history to determine whether it includes divestiture. Then, based on its reading of a colloquy during a hearing before a subcommittee of the Judiciary Committee of the House of Representatives, it concluded that the draftsmen of the bill did not intend to authorize the remedies of

"dissolution" or "divestiture" in actions brought by private litigants. 518 F. 2d, at 921–922. The Court of Appeals for the First Circuit has rejected that reasoning. It found instead that a fair reading of the statutory text, buttressed by recognized canons of construction,[4] required a construction of the words "injunctive relief" broad enough to encompass divestiture. Moreover, it doubted whether the references to "dissolution" in the legislative history referred to "divestiture," and did not consider this evidence sufficiently probative, in any event, to justify a restrictive reading of the Act that seemed inconsistent with its basic policy. 754 F. 2d, at 415–428.

American endorses the analysis of the Court of Appeals for the Ninth Circuit, but places greater reliance on two additional arguments. First, it argues that there is a significant difference between the text of § 15 of the Act, which authorizes equitable relief in actions brought by the United States, and the text of § 16, which applies to other parties. Specifically, it argues that the former is broad enough to encourage "structural relief" whereas the latter is limited to relief against anticompetitive "conduct." Second, reading § 16 in its historical context, American argues that it reflects a well-accepted distinction between prohibitory injunctions (which are authorized) and mandatory injunctions (which, American argues, are not).

American's argument directs us to two provisions in the statutory text, and that is the natural place to begin our analysis. Section 15 grants the federal district courts jurisdiction "to prevent and restrain violations of this Act" when

[4] The Court of Appeals observed:

"Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F. 2d 404, 428 (1985).

United States attorneys "institute proceedings in equity to prevent and restrain such violations" through petitions "praying that such violation shall be enjoined or otherwise prohibited."[5] Section 16 entitles "[a]ny person, firm, corporation, or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[6]

It is agreed that the general language of § 15, which provides that antitrust violations "shall be enjoined or otherwise prohibited," is broad enough to authorize divestiture. Indeed, in Government actions divestiture is the preferred

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[5] The section provides in pertinent part:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. . . ." 15 U. S. C. § 25.

[6] The section provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss of damage is immediate, a preliminary injunction may issue . . . ." 15 U. S. C. § 26.

remedy for an illegal merger or acquisition. As we wrote in the *Du Pont* case:

> "Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 329–331 (1961) (footnotes omitted).

On its face, the simple grant of authority in § 16 to "have injunctive relief" would seem to encompass divestiture just as plainly as the comparable language in § 15. Certainly § 16's reference to "injunctive relief . . . against threatened loss or damage" differs from § 15's grant of jurisdiction to "prevent and restrain violations," but it obviously does not follow that one grant encompasses remedies excluded from the other.[7] Indeed, we think it could plausibly be argued that § 16's terms are the more expansive. In any event, however, as the Court of Appeals for the First Circuit correctly observed, § 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. . . . Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." 754 F. 2d, at

[7] That the two provisions do differ is not surprising at all, since § 15 was largely copied from § 4 of the Sherman Act, see 26 Stat. 209, ch. 647, 15 U. S. C. § 4, while § 16, which had to incorporate standing limits appropriate to private actions—see *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986)—had no counterpart in the Sherman Act.

416. We agree that the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations.

American rests its contrary argument upon two phrases in § 16 that arguably narrow its scope. The entitlement "to sue for and have injunctive relief" affords relief "against threatened loss or damage by a violation of the antitrust laws." Moreover, the right to such relief exists "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

In this case, however, the requirement of "threatened loss or damage" is unquestionably satisfied. The allegations of the complaint, the findings of the District Court, and the opinion of the Court of Appeals all assume that even if the merger is a completed violation of law, the threatened harm to California consumers persists. If divestiture is an appropriate means of preventing that harm, the statutory reference to "threatened loss or damage" surely does not negate the court's power to grant such relief.[8]

The second phrase, which refers to "threatened conduct that will cause loss or damage," is not drafted as a limitation on the power to grant relief, but rather is a part of the general reference to the standards that should be applied in fashioning injunctive relief. It is surely not the equivalent of a directive stating that unlawful conduct may be prohibited but structural relief may not be mandated. Indeed, as the Ninth Circuit's analysis of the issue demonstrates, the distinction between conduct and structure—or between prohibitory and mandatory relief—is illusory in a case of this kind. Thus, in the *IT&T* case the court recognized that an injunction prohib-

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[8] Indeed, the evident import of Congress' reference to *"threatened* loss or damage" is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130, and n. 24 (1969).

iting the parent company from voting the stock of the subsidiary should not be treated differently from a mandatory order of divestiture.[9] And in this case the court treated the Hold Separate Agreement as a form of "indirect divestiture." In both cases the injunctive relief would unquestionably prohibit "conduct" by the defendants. American's textual arguments—which rely on a distinction between mandatory and prohibitive relief—do not explain why such remedies would not be appropriate.[10]

If we assume that the merger violated the antitrust laws, and if we agree with the District Court's finding that the conduct of the merged enterprise threatens economic harm to California consumers, the literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm. This interpretation is consistent with our precedents, which have upheld injunctions issued pursuant to § 16 regardless of whether they were mandatory or prohibitory in character. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 129–133 (1969) (reinstating injunction that required defendants to withdraw from patent pools); see also *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 345, 365 (1963) (reinstating judgment for defendants in suit to compel

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[9] The District Court in the *IT&T* case had observed that "'[i]f it were necessary to strain terminology in order to accomplish the same result, a court could easily phrase a "negative injunction" in such terms as to enjoin the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation.'" 518 F. 2d, at 924. The Court of Appeals admitted the force of this observation, agreeing with the District Court that the *Standard Oil* dissolution decree, *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 78 (1911), served as an example of an "'indirect' divestiture decre[e]." 518 F. 2d, at 924.

[10] Notably, the Court of Appeals for the Ninth Circuit did not rely on either of the textual arguments that American has advanced here. Had it done so, it would have been forced to acknowledge a distinction between direct divestiture and indirect divestiture.

installation of wire services). We have recognized when construing § 16 that it was enacted "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.*, 395 U. S., at 130–131. We have accordingly applied the section "with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Ibid.*, quoting *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944).

Finally, by construing § 16 to encompass divestiture decrees we are better able than is American to harmonize the section with its statutory context. The Act's other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect "*may be* substantially to lessen competition." Clayton Act § 7, 38 Stat. 731, 15 U. S. C. § 18 (emphasis supplied). See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 323 (1962). In addition, § 5 of the Act provided that during the pendency of a Government action, the statute of limitations for private actions would be tolled. The section also permitted plaintiffs to use the final judgment in a Government antitrust suit as prima facie evidence of liability in a later civil suit. Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition. See *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 318 (1965). Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a § 7 violation: In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator of § 7 "cease and desist from the violation," and, specifically, that the violator

"divest itself of the stock held" in violation of the Act.[11] Section 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

III

Although we do not believe the statutory language is ambiguous, we nonetheless consider the legislative history that persuaded the Ninth Circuit to place a narrow construction on § 16. To understand that history, however, it is necessary to place the statute in its historical perspective.

The Sherman Act became law just a century ago. It matured some 15 years later, when, under the administation of Theodore Roosevelt, the Sherman Act "was finally being used against trusts of the dimension that had called it into

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[11] In the context of construing the FTC's authority to issue such "cease and desist" orders, this Court—speaking through Justice McReynolds, who had served as President Wilson's chief antitrust enforcement officer at the time the Clayton Act was framed—had no difficulty finding that the continuing ownership of stock unlawfully acquired was itself a continuing violation of the Act:

"The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed." *FTC* v. *Western Meat Co.*, 272 U. S. 554, 559 (1926).

The suggestion that continuing ownership of stock unlawfully acquired might constitute a "further violatio[n] of the Act" would cast some doubt upon the utility of American's distinction between mandatory and prohibitory injunctions even were we inclined to accept the relevance of that distinction. As we reject the distinction, we have, however, no cause to pursue this line of inquiry further.

being, and with enough energy to justify the boast that the President was using a Big Stick." W. Letwin, Law and Economic Policy in America 240 (1965). Two of the most famous prosecutions concluded in 1911, with decisions from this Court endorsing the "Rule of Reason" as the principal guide to the construction of the Sherman Act's general language. *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. In consequence of the violations found in those two cases, wide-ranging injunctions were entered requiring the separation of the "oil trust" and the "tobacco trust" into a number of independent, but still significant, companies. The relief granted received mixed reviews. In some quarters, the cases were hailed as great triumphs over the forces of monopoly; in others, they were regarded as Pyrrhic victories.[12]

Concern about the adequacy of the Sherman Act's prohibition against combinations in restraint of trade prompted President Wilson to make a special address to Congress in 1914 recommending that the antitrust laws be strengthened. 2 The New Democracy, The Public Papers of Woodrow Wilson 81–89 (R. Baker & W. Dodd eds. 1926). Congressman Clayton, the Chairman of the House Judiciary Committee, promptly appointed a subcommittee to prepare the legislation. The bill drafted by the subcommittee contained most of the provisions that were eventually enacted into the law now known as the Clayton Act. The statute reenacted certain provisions of the Sherman Act and added new provisions of both a substantive and procedural character. Letwin,

[12] The Taft Administration received the decisions warmly, but they provoked bitter criticism from the Democratic Party leadership. Antitrust policy was sharply debated during the 1912 Presidential campaign. See W. Letwin, Law and Economic Policy in America 266, 269 (1965). Upon becoming Woodrow Wilson's first Attorney General shortly thereafter, James McReynolds promised to deliver dissolutions "free from the fundamental defect in the plans adopted in the Standard Oil and Tobacco cases where the separate parts into which the business was divided were left under the control of the same stockholders." Annual Report of Attorney General, H. R. Doc. No. 460, 63d Cong., 2d Sess., 7 (1913).

Law and Economic Policy in America, at 272–273; 2 A. Link, Wilson: The New Freedom 426 (1956). Thus, § 4 of the Sherman Act, which authorizes equitable relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions. Section 7 of the Clayton Act made stock acquisitions of competing companies more vulnerable, and §§ 4 and 5 gave special procedural advantages to private litigants. The reform project had broad social significance, and it is obvious that the Act as a whole is fairly characterized as important remedial legislation.

Some proponents of reform, however, were critical of the bill for not going further. Thus, for example, proposals that were never enacted would have expressly authorized private individuals to bring suit for the dissolution of corporations adjudged to have violated the law and for appointment of receivers to wind up the corporation's affairs.[13] Samuel Untermyer, a New York lawyer who urged Congress to give private plaintiffs express authority to seek dissolution decrees, stated his views in a colloquy with Congressman John Floyd during a hearing on the bill before the House Judiciary Committee. Floyd told Untermyer that "We did not intend by section 13 to give the individual the same power to bring a suit to dissolve the corporation that the Government has," and added that the committee Mem-

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[13] An amendment passed by the Senate, but rejected by the House, provided:

"That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises, or property of other corporations, copartnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its dissolution and shall to that end appoint receivers to wind up its affairs and shall cause all of its assets to be sold in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said corporation or combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured." 51 Cong. Rec. 15863 (1914).

bers had discussed the matter very thoroughly. Untermyer replied that "the very relief that the man needs nine times out of ten is the dissolution of the corporation, because . . . it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him." Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess., 842–846 (1914) (House Hearings).

Two weeks later, Louis Brandeis, testifying on behalf of the administration before the same committee, was asked whether he favored a proposal "to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform." Brandeis responded that the proposal was not sound and added:

> "It seems to me that the right to change the status [of the combination], which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future wrongs is a right which every individual ought to enjoy.
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> "Now, all of this procedure ought to be made so as to facilitate, so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust." *Id.*, at 649–650.

American relies on these exchanges to support two slightly different arguments. First, it suggests that the committee recognized a distinction between relief directed at conduct and relief that is designed to change a company's status or structure. Second, it suggests that Congressman Floyd's statements permit an inference that the Congress as a whole rejected the possibility of a private dissolution remedy, and

thereby rejected divestiture as well, because divestiture is a species of dissolution. Neither suggestion is persuasive.

We have already concluded that the suggested distinction between divestiture and injunctions that prohibit future conduct is illusory. These excerpts, moreover, from the legislative history provide even less support for such a categorical distinction than does the text of § 16 itself.

The flaw in American's second suggestion is its assumption that the dissolution proposals submitted to Congress contemplated nothing more extreme than divestiture. Dissolution could be considerably more awesome. As the New York Court of Appeals ominously declared before affirming a decree against the North River Sugar Refining Company, dissolution was a "judgment . . . of corporate death," which "represent[ed] the extreme rigor of the law."[14] This meaning is evident from the text of the Senate amendment proposing private dissolution suits, which provided for a receiver to administer the doomed corporation's assets.[15]

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[14] *People* v. *North River Sugar Refining Co.*, 121 N. Y. 582, 608, 24 N. E. 834 (1890). The New York attorney general had sought dissolution of the company for its participation in the sugar trust, relying upon two theories: that dissolution was appropriate because the company had violated the terms of its charter by entering the trust, and that dissolution was appropriate under the state antitrust laws. The Court of Appeals agreed that dissolution was appropriate on the first ground, and so declined to reach the second. *Id.*, at 626, 24 N. E., at 841.

Judge Finch, writing for a unanimous court, began the opinion by announcing: "The judgment sought against the defendant is one of corporate death." *Id.*, at 608, 24 N. E., at 834. He then said that although the "life of a corporation is indeed less than that of the humblest citizen," "destruction of the corporate life" may not be effected "without clear and abundant reason." *Ibid.* The ensuing opinion bristles with the rhetoric of moral condemnation; when characterizing the corporation's defense, for example, Judge Finch commented that the court had been asked "to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure." *Id.*, at 626, 24 N. E., at 837.

[15] See n. 13, *supra*. Senator Reed, the sponsor of the Senate amendment which would have expressly authorized dissolution proceedings, stated that the statute's dissolution remedy should guarantee that "we

The concept of dissolution, of course, also encompassed remedies comparable to divestiture, or to our present-day understanding of dissolution.[16] It was one thing to dissolve a

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shall have a real decree, that there shall be a real burial, and that we shall sod down the grave upon the monster that was created in defiance of law, but that we shall at the same time preserve its parts and restore them to competition and activity . . . ." 51 Cong. Rec. 15864 (1914).

[16] There is a common core to present-day and early 20th-century understandings of the distinction between dissolution and divestiture:

"As applied in both early and more recent antitrust cases, 'dissolution' refers to an antitrust judgment which dissolves or terminates an illegal combination or association—putting it out of business, so to speak. 'Divestiture' is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets." Oppenheim, Divestiture as a Remedy Under the Federal Antitrust Laws, 19 Geo. Wash. L. Rev. 119, 120 (1950).

Nevertheless, for at least the past four decades dissolution and divestiture have been treated as interchangeable terms in antitrust law. See *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 330, n. 11 (1961) (terms are to a "large degree interchangeable"); see also Oppenheim, 19 Geo. Wash. L. Rev., at 121 (recognizing technical distinction between terms, but treating them as interchangeable nonetheless).

During the first decades of this century, however, "dissolution" was the favored term for a remedy that put an end to an unlawful combination and "divestiture" was rarely mentioned in the antitrust context. The early 20th-century treatise writers seem to have spoken exclusively in terms of dissolution. See, *e. g.*, W. Thornton, A Treatise on the Sherman Anti-Trust Act § 372 (1913). Not surprisingly, all of the legislative history cited by the parties to this case refers to dissolution, not to divestiture.

Yet even without using the term "divestiture," Congress could and did recognize the appropriateness of a divestiture remedy in merger cases: § 11 of the Clayton Act expressly authorizes the FTC to order a defendant corporation to "divest itself of the stock held . . . contrary to the provisions of sectio[n] seven . . . of this Act." 38 Stat. 735. Indeed, the term "divestiture" appears to have entered the antitrust vocabulary as a consequence of FTC proceedings against alleged violators of § 7 of the Act. See, *e. g.*, *Arrow-Hart & Hegeman Electric Co.* v. *FTC*, 291 U. S. 587 (1934); *FTC* v. *Western Meat Co.*, 272 U. S. 554 (1926). Use of the term in those cases is unsurprising, for the text of the Act suggested that "divestiture," rather than "dissolution," was the remedy being sought.

By 1944, Justice Douglas was using the two terms in close proximity, see *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188–189 (1944)

pool, trust, combination, or merger, and quite another to atomize, or to revoke the charter of, a large corporation.[17] In the early part of this century, however, new forms of corporate organization were arising at a pace that outstripped the vocabulary used to describe them.[18] Concern about monopoly and competition dominated domestic politics, but people disagreed about what these things were, and about why, and to what extent, they were good or bad.[19] Men like McReynolds, Wilson's Attorney General, and Brandeis, the President's chief adviser on antitrust policy, could concur upon the need for forceful antitrust legislation and prosecution while finding themselves parted—as their later battles on this Court made clear—by a vast gulf in their understandings of economic theory and marketplace ethics.[20] Absent

(Sherman Act case), although it is at least arguable that his usage preserved the technical distinction that was to be generally elided less than a decade later. Cf. *Swift & Co.* v. *United States*, 276 U. S. 311, 319 (1928) (referring to "divestiture of the instrumentalities" in a case raising both Sherman Act and Clayton Act claims). It would appear that, as the moral conception of dissolution lost favor and divestiture decrees became paradigmatic of dissolution remedies, the two concepts were collapsed into one another.

[17] For discussion of the scope of various dissolution decrees entered pursuant to the federal antitrust laws, see Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size, 40 Colum. L. Rev. 615 (1940); Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L. J. 1 (1951). See also 2 A. Link, Wilson: The New Freedom 417–423 (1956).

[18] See, *e. g.*, H. Thorelli, The Federal Antitrust Policy 72–87 (1954). Thorelli observes that "[n]o general incorporation law before 1888 explicitly sanctioned intercorporate stockholdings; some state laws even explicitly forbade them in the absence of special permission by the legislature. Common law rules did not recognize such relationships between corporations." *Id.*, at 83. Perhaps because of the rapid pace of developments in corporate law, the politically charged "trust" concept came to embrace any large corporate combination as well as one specific device for creating such combinations. *Id.*, at 84–85. See also D. Martin, Mergers and the Clayton Act 15, 43 (1959).

[19] See, *e. g.*, Thorelli, The Federal Antitrust Policy, at 108–163, 309–352.

[20] See 2 Link, Wilson: The New Freedom, at 117, n. 83.

agreement on the terms of debate, dissolution could mean the corporate death sentence, or the decrees of the *Standard Oil* and *American Tobacco* cases, or something else.[21] So long as this ambiguity persisted, dissolution had to be considered a public remedy, one that encompassed a power peculiarly suited to transgressions so "material and serious" as to "harm or menace the public welfare" in a manner transcending the "quarrels of private litigants."[22] For those like Brandeis, who viewed dissolution as desirable only if treated not as a moral penalty but rather as a necessary economic remedy,[23] it would be imprudent to allow private parties to control a weapon potentially so lethal. Although it may now be second nature to conceive of dissolution in economic terms compatible with the policy Brandeis championed,[24] this view was anything but uncontroversial when the Act was drafted.[25]

Once the historical importance of the distinction between dissolution and divestiture is understood, American's argument from the legislative history becomes singularly unpersuasive. The rejection of a proposed remedy that would terminate the corporate existence of American and appoint a

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[21] See *CIA. Petrolera Caribe, Inc.*, 754 F. 2d, at 419–422.

[22] *North River Sugar Refining Co.*, 121 N. Y., at 609, 24 N. E., at 835.

[23] "[Brandeis] believed that anti-trust policy should be constructive rather than destructive: '. . . we should approach this subject from the point of view of regulation rather than of restriction; because industrial crime is not a cause, it is an effect—the effect of a bad system.'" A. Mason, Brandeis: A Free Man's Life 402 (1956) (footnote omitted).

[24] Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S., at 326 ("divestiture" is the "most drastic, but most effective, of antitrust remedies," yet it should be imposed only to "restore competition" and must not be "punitive"). See also Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441, 1478–1483 (1987) (discussing decline of moral conceptions of the corporation).

[25] The notion that a proper remedy for violating the antitrust laws is complete dissolution of the wrongdoer persists in some state antitrust statutes that allow termination of a foreign corporation's right to do business within the State when the corporation is found guilty of violating the law. See, *e. g.*, Wis. Stat. § 133.12 (1987–1988).

receiver to supervise the disposition of its assets is surely not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets. Dissolution was too vague and ill defined a remedy to be either incorporated into or excluded from § 16 as such; Congress instead sensibly avoided the problematic word and spoke in terms of equitable relief drawn to redress damage or loss which a private party might suffer by consequence of the Act's violation.[26] That divestiture was encompassed within the concept of dissolution as understood at the time of the Clayton Act's framing does not imply that the equitable formulation of § 16 cannot permit divestiture while excluding more severe sanctions that also traveled under the name "dissolution."

For similar reasons, we need not consider how much weight might otherwise be due to *Graves* v. *Cambria Steel Co.*, 298 F. 761 (NY 1924), a brief District Court decision by Judge Learned Hand upon which American relies heavily.[27] The suit appears to have been brought by dissatisfied shareholders of a target corporation who wished to dissolve the new merged entity. The plaintiffs sought relief

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[26] Congress could, of course, have referred expressly to the divestiture remedy, as was done in § 11 of the Act, directing that the FTC shall require a violator of § 7 to "divest itself of the stock" unlawfully acquired. There was, however, no reason for Congress to itemize the various remedies which might be available in a § 16 suit. Moreover, while divestiture might be the appropriate remedy in every § 7 case prosecuted by the FTC, there is no reason to believe that the same would be true in private § 7 cases. There is thus nothing remarkable about the absence of any specific reference to divestiture in § 16.

[27] American also seeks to buttress its position by citations to *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921); *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 287 (1922); *Continental Securities Co.* v. *Michigan Cent. R. Co.*, 16 F. 2d 378 (CA6 1926), cert. denied, 274 U. S. 741 (1927); and *Venner* v. *Pennsylvania Steel Co. of New Jersey*, 250 F. 292 (NJ 1918). Several of these cases seem to us to involve issues entirely distinct from those posed here, and, in any event, in none of these precedents do we find anything that casts any doubt upon the rule we announce today.

under § 16 of the Clayton Act. Judge Hand remarked that the suit "is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act." 298 F., at 762. Not only does Hand, like Floyd, Untermyer, and Brandeis before him, refer to dissolution rather than divestiture, but, moreover, the state corporation law overtones of the inchoate complaint make it possible that the suit implicated the more drastic forms of dissolution.

The inferences that American draws from its excerpts from the subcommittee hearings simply are not confirmed by anything that has been called to our attention in the Committee Reports, the floor debates, the Conference Report, or contemporaneous judicial interpretations.[28] Indeed, a fair reading of the entire legislative history supports the conclusion that § 16 means exactly what it says when it endorses the "conditions and principles" governing injunctive relief in courts of equity: that the provision should be construed generously and flexibly pursuant to principles of equity. See

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[28] Professors Areeda and Turner have criticized the Court of Appeals for the Ninth Circuit on the ground that it did not correctly evaluate the legislative history of § 16 in *IT&T*. Areeda and Turner state that the "fragment of legislative history" relied upon by the Court of Appeals "cannot bear the weight the court placed upon it, when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." They point out that "other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers," and conclude that "divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff." 2 P. Areeda & D. Turner, Antitrust Law § 328b (1978) (footnotes omitted). Other commentators have likewise reasoned that § 16 affords private plaintiffs a divestiture remedy. See, *e. g.*, Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Tex. L. Rev. 54 (1969); Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1964); Note, Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act, 84 Mich. L. Rev. 1579 (1986).

CIA. Petrolera Caribe, Inc., 754 F. 2d, at 418–427. As the Court stated in *Hecht Co.* v. *Bowles*, 321 U. S., at 329:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

More recently, in *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982), we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. "'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid.*, quoting *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946). These principles unquestionably support a construction of the statute that will enable a chancellor to impose the most effective, usual and straightforward remedy to rescind an unlawful purchase of stock or assets. The fact that the term "divestiture" is used to describe what is typically nothing more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

IV

Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See *Du Pont*, 366 U. S., at 319–321; see also *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"); *United States* v. *San Francisco*, 310 U. S. 16, 30–31 (1940)

(authorizing issuance of injunction at Government's request without balancing of the equities). A private litigant, however, must have standing—in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986). Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

Such questions, however, are not presented in this case. We are merely confronted with the naked question whether the District Court had the power to divest American of any part of its ownership interests in the acquired Lucky Stores, either by forbidding the exercise of the owner's normal right to integrate the operations of the two previously separate companies, or by requiring it to sell certain assets located in California. We hold that such a remedy is a form of "injunctive relief" within the meaning of § 16 of the Clayton Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

In agreement with our holding that § 16 of the Clayton Act does authorize divestiture as a remedy for violations of § 7 of the Clayton Act, I join the Court's opinion. I write further to note that both the respondents and various interested labor unions, the latter as *amici curiae*, have argued for a different result on the basis of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Clayton Act § 7A, as added and amended), 15 U. S. C. § 18a. See Brief for Respondents 47–48; Brief for United Food and Commercial International Union et al. as *Amici Curiae* 7–15. Although I do not believe that § 7A is controlling as an interpretation of the ear-

lier enacted § 16, it may be of vital relevance in determining whether to order divestiture in a particular case.

Section 7A enables the Federal Government to review certain transactions that might violate § 7 before they occur. The provision, in brief, requires those contemplating an acquisition within its coverage to provide the Federal Trade Commission (FTC) with the information necessary for determining "whether such acquisition may, if consummated, violate the antitrust laws." 15 U. S. C. § 18a(d)(1). During the mandatory waiting period that follows the submission of this information, see § 18a(b)(1), the agency may decide, as it did in this case, to negotiate a settlement intended to eliminate potential violations. See 16 CFR §§ 2.31–2.34 (1989). The procedure may resolve antitrust disputes in a manner making it easier for businesses and unions to predict the consequences of mergers and to conform their economic strategies in accordance with the probable outcome.

The respondents, and the unions in their brief as *amici*, argue that a State or private person should not have the power to sue for divestiture under § 16 following a settlement approved by the FTC. They maintain that the possibility of such actions will reduce the Federal Government's negotiating strength and destroy the predictability that Congress sought to provide when it enacted § 7A. It is plausible, in my view, that allowing suits under § 16 may have these effects in certain instances. But the respondents and unions have identified nothing in § 7A that contradicts the Court's interpretation of § 7 and § 16. Section 7A, indeed, may itself contain language contrary to their position. See, *e. g.*, 15 U. S. C. § 18a(i)(1). Although Congress might desire at some point to enact a strict rule prohibiting divestiture after a negotiated settlement with the FTC, it has not done so yet.

The Court's opinion, however, does not render compliance with the Hart-Scott-Rodino Antitrust Improvements Act irrelevant to divestiture actions under § 16. The Act, for instance, may bear upon the issue of laches. By establishing a

time period for review of merger proposals by the FTC, § 7A may lend a degree of objectivity to the laches determination. Here the State received the respondents' § 7A filings in mid-April 1988, see Brief for Petitioner 3, and so had formal notice of the parties' intentions well before completion of the merger or the settlement with the FTC. It elected not to act at that time, but now seeks a divestiture which, the facts suggest, would upset labor agreements and other matters influenced in important ways by the FTC proceeding. These considerations should bear upon the ultimate disposition of the case. As the Ninth Circuit stated:

> "California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice." 872 F. 2d 837, 846 (1989).

With the understanding that these consequences may include the bar of laches, I join the Court's decision.

Syllabus

PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89–386. Argued February 26, 1990—Decided April 30, 1990*

Petitioner Port Authority Trans-Hudson Corp. (PATH) is an entity created by New York and New Jersey to operate certain transportation facilities. Alleging that they incurred injuries during their employment with PATH, respondents filed separate complaints against PATH in the District Court to recover damages pursuant to the Federal Employers' Liability Act. The court dismissed the complaints on the ground that PATH enjoyed the States' sovereign immunity and thus that the Eleventh Amendment deprived the court of jurisdiction. The Court of Appeals reversed in both cases, holding that the Eleventh Amendment did not bar the suits because, *inter alia*, any immunity that PATH possessed had been waived under identical statutes of both States, which provided that the States "consent to suits . . . against [PATH]," and that "[t]he foregoing consent is granted upon the condition that venue in any [such] suit . . . shall be laid within a . . . judicial district, established by . . . the United States."

Held: The statutory consent to suit provision, as elucidated by the venue provision, establishes the States' waiver of any Eleventh Amendment immunity that might otherwise bar respondents' suits against PATH. It is appropriate here to assume, *arguendo*, that PATH is a state agency entitled to the States' sovereign immunity. *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 279. In determining whether a State has waived such immunity, this Court applies a particularly strict standard: A waiver will be given effect "only where stated by the most express language or by such overwhelming implication as [will] leave no room for any other reasonable construction." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 239–240. Moreover, a State does not waive its immunity by consenting to suit only in its own courts, but must specify its intention to subject itself to suit in *federal court*. *Id.*, at 241. Here, the statutory venue provision suffices to resolve any ambiguity contained in the general consent to suit provision by expressly indicating that the States' consent extends to suit in federal court. PATH's argu-

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*Together with *Port Authority Trans-Hudson Corp.* v. *Foster*, also on certiorari to the same court (see this Court's Rule 12.2).

ment that the venue provision cannot control the construction of the consent to suit provision is rejected. The venue provision directly indicates the extent of the States' waiver embodied in the consent provision, because the States passed both provisions as portions of the same Acts; because the venue provision expressly refers to and qualifies the consent provision; and because venue issues are closely related to immunity issues in that a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. PATH's related argument that the venue provision cannot broaden the consent provision begs the question what the States intended through the latter provision. The venue provision elucidates rather than broadens the consent provision's meaning by removing an ambiguity: The venue provision would hardly qualify "[t]he foregoing consent" unless the States intended that consent to include federal court suits. Furthermore, PATH suggests no "reasonable construction" as an alternative to the interpretation that the phrase "judicial district, established . . . by the United States" sets forth consent to suit in federal court. Pp. 304–309.

873 F. 2d 628 and 873 F. 2d 633, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Part I, and the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 309.

Joseph Lesser argued the cause for petitioner. With him on the briefs were *Arthur P. Berg*, *Anne M. Tannenbaum*, and *Carlene V. McIntyre*.

Richard W. Miller argued the cause for respondents. With him on the brief was *Peter M. J. Reilly*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

These cases call upon the Court to determine whether the Eleventh Amendment bars respondents' suits in federal

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†*Benna Ruth Solomon* and *Charles Rothfield* filed a brief for the Council of State Governments et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for American Airlines, Inc., et al. by *Lawrence Mentz;* and for Pan American World Airways, Inc., et al. by *Raymond T. Munsell*.

court against an entity created by New York and New Jersey to operate certain transportation and other facilities.

I

In 1921, New York and New Jersey entered a bistate compact creating the Port Authority of New York and New Jersey (Authority). 1921 N. J. Laws, chs. 151, 154; see N. J. Stat. Ann. § 32:1–1 *et seq.* (West 1963); N. Y. Unconsol. Laws § 6401 *et seq.* (McKinney 1979). In accord with the Constitution's Compact Clause, Art. I, § 10, cl. 3, Congress consented to the compact. 42 Stat. 174 (1921). Through the compact, the States created the Authority to achieve "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York," N. J. Stat. Ann. § 32:1–1 (West 1963); N. Y. Unconsol. Laws § 6401 (McKinney 1979), and lodged in the Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the port] district." N. J. Stat. Ann. § 32:1–7 (West 1963); N. Y. Unconsol. Laws § 6407 (McKinney 1979). See generally *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 4–5 (1977); E. Bard, The Port of New York Authority (1942). The Port Authority Trans-Hudson Corp. (PATH), petitioner in these consolidated cases, is a wholly owned subsidiary of the Authority that operates an interstate railway system and other facilities. PATH is entitled to "all of the privileges, immunities, tax exemptions and other exemptions of the port authority" and is subject to suit to the same extent as the Authority. See N. J. Stat. Ann. § 32:1–35.61 (West 1963); N. Y. Unconsol. Laws § 6612 (McKinney 1979).

Respondents Patrick Feeney and Charles Foster alleged injuries incurred during their employment with PATH. Both filed separate complaints against PATH in the United States District Court for the Southern District of New York to recover damages pursuant to the Federal Employers' Li-

ability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.* (1982 ed.), the Boiler Inspection Act, 36 Stat. 913, as amended, 45 U. S. C. § 22 (1982 ed.), and the Safety Appliance Act, 27 Stat. 531, 45 U. S. C. § 1 (1982 ed.). PATH moved to dismiss both complaints, asserting that PATH enjoyed New York and New Jersey's sovereign immunity and thus that the Eleventh Amendment deprived the federal court of jurisdiction over the suits. Relying in part on *Port Authority Police Benevolent Assn., Inc.* v. *Port Authority of New York and New Jersey*, 819 F. 2d 413 (CA3), cert. denied, 484 U. S. 953 (1987), the District Court concluded that the Eleventh Amendment deprived it of jurisdiction and dismissed respondents' complaints. App. to Pet. for Cert. A–27, A–46. In *Port Authority Police Benevolent Assn.*, the Court of Appeals for the Third Circuit reasoned that because the States had established the Authority as a state agency and continued to exercise extensive control over its operations, the Authority was entitled to Eleventh Amendment immunity. 819 F. 2d, at 413. The court also found no waiver of that immunity. *Id.*, at 418, n. 2.

The Court of Appeals for the Second Circuit held that the Eleventh Amendment did not bar Feeney's suit because "the Eleventh Amendment immunity either does not extend to [PATH] or has been waived." 873 F. 2d 628, 628–629 (1989). The court concluded that PATH did not enjoy the States' sovereign immunity, principally because the treasuries of New York and New Jersey are largely insulated from PATH's liabilities. *Id.*, at 631–632. In reaching its conclusion that the States had waived any immunity that PATH possessed, the court relied upon two provisions of an Act governing suits against the Authority and its subsidiaries and passed by New York (in 1950) and New Jersey (in 1951). 1951 N. J. Laws, ch. 204; 1950 N. Y. Laws, ch. 301; see N. J. Stat. Ann. § 32:1–157 *et seq.* (West 1963); N. Y. Unconsol. Laws § 7101 *et seq.* (McKinney 1979). The first section provided that the States "consent to suits, actions or proceedings of any form

or nature at law, in equity or otherwise . . . against the Port of New York Authority." N. J. Stat. Ann. § 32:1–157 (West 1963); N. Y. Unconsol. Laws § 7101 (McKinney 1979). Another section provided in part:

> "The foregoing consent [of N. J. Stat. Ann. § 32:1–157; N. Y. Unconsol. Laws § 7101] is granted upon the condition that venue in any suit, action or proceeding against the Port Authority shall be laid within a county or a judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District. The Port Authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions, or proceedings." N. J. Stat. Ann. § 32:1–162 (West 1963); N. Y. Unconsol. Laws § 7106 (McKinney 1979).

The court concluded that, despite the "somewhat anomalous" location of an indication of waiver in a venue provision, the statutory provisions demonstrated "an intent to allow the Port Authority to be sued in the designated federal courts and is thus an explicit waiver, albeit partial, of the Eleventh Amendment [immunity]." 873 F. 2d, at 633. The Second Circuit reversed the District Court's dismissal of Foster's complaint on identical grounds. 873 F. 2d 633 (1989). Two days before the Second Circuit issued these decisions, the Third Circuit had reaffirmed and elaborated its conclusion that the States had not waived the sovereign immunity that extended to PATH. See *Leadbeater* v. *Port Authority Trans-Hudson Corp.*, 873 F. 2d 45 (1989), cert. pending, No. 89–479. That court acknowledged that "[i]t is certainly arguable that the consent to suit statutes, read in light of this venue provision, create the 'overwhelming implication' of consent to suit in federal court," but held that "[n]ot without some unease, we conclude that the venue provision fails to constitute the requisite showing that the states intended to waive P. A. T. H.'s [E]leventh [A]mendment immunity." *Id.*, at 49. To resolve this conflict, we granted certiorari to

review the consolidated decisions of the Second Circuit, 493 U. S. 932 (1989), and we now affirm.

II

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." This Court has drawn upon principles of sovereign immunity to construe the Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'" *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 100 (1984) (quoting *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 280 (1973)); see also *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 29 (1989) (SCALIA, J., concurring in part and dissenting in part); *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468 (1987) (plurality opinion). The Eleventh Amendment bar to suit is not absolute. States may consent to suit in federal court, see, *e. g.*, *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241 (1985); *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883), and, in certain cases, Congress may abrogate the States' sovereign immunity. See, *e. g.*, *Dellmuth* v. *Muth*, 491 U. S. 223 (1989).

Respondents challenge PATH's claim that it is a state agency entitled to the Eleventh Amendment immunity of New York and New Jersey. *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), guides our resolution of this issue. In *Petty*, the Court considered whether the Eleventh Amendment barred a federal court from entertaining an action under the Jones Act, 46 U. S. C. § 688 (1958 ed.), brought against the Tennessee-Missouri Bridge Commission. Similar to the Authority, the Commission constructed and operated transportation facilities pursuant to a

bistate compact entered by Tennessee and Missouri and ratified by Congress. The Court "assume[d] *arguendo* that this suit must be considered as one against the States since this bi-state corporation is a joint or common agency of Tennessee and Missouri," 359 U. S., at 279, but concluded that the States had waived any immunity that the Commission possessed. Because we find that the States of New York and New Jersey have consented to suit against PATH in federal court, we conclude that a similar course is appropriate in this case.

Well-established law governs abrogation and waiver of Eleventh Amendment immunity. Because "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,'" *Dellmuth* v. *Muth*, *supra*, at 227 (quoting *Atascadero State Hospital*, 473 U. S., at 238), and because States are unable directly to remedy a judicial misapprehension of that abrogation, the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity. See *id.*, at 242 ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"). Respondents do not assert that Congress has abrogated the States' sovereign immunity through any of the statutes that underlie their claims against PATH, and such arguments would be unavailing. See *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S., at 468 (opinion of Powell, J.); *id.*, at 495 (SCALIA, J., concurring in part and concurring in judgment). Similar solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived that immunity. The Court will give effect to a State's waiver of Eleventh Amendment immunity "'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Atascadero State Hospital*, *supra*, at 239–

240 (quoting *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974) (internal quotation omitted)). A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, see, *e. g.*, *Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981) *(per curiam)*, and "[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Atascadero State Hospital*, *supra*, at 241.

New York and New Jersey have expressly consented to suit in expansive terms. The statutory consent to suit provision, which provides that the States "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority," N. J. Stat. Ann. §32:1–157 (West 1963); N. Y. Unconsol. Laws §7101 (McKinney 1979), might be interpreted to encompass the States' consent to suit in federal court as well as state court. But such a broadly framed provision may also reflect only a State's consent to suit in its own courts. See, *e. g.*, *Atascadero State Hospital*, *supra*, at 241. Sensitive to the values underlying the Eleventh Amendment, the Court has required that consent to suit in federal court be express and thus has construed such ambiguous and general consent to suit provisions, standing alone, as insufficient to waive Eleventh Amendment immunity. See 473 U. S., at 241 (general consent to suit provision did not waive Eleventh Amendment immunity because the "provision does not specifically indicate the State's willingness to be sued in federal court"); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1944) ("When a state authorizes a suit against itself . . . , it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts"). Other textual evidence of consent to suit in federal courts may resolve that ambiguity and sufficiently

clearly establish the scope of the State's more general consent to suit. In such circumstances, the Court must give effect to that clearly indicated consent to suit in federal court.

In this case, the statutory venue provision suffices to resolve any ambiguity contained in the States' general consent to suit provision by expressly indicating that the States' consent to suit extends to suit in federal court. The section provides that "[t]he foregoing consent [of N. J. Stat. Ann. § 32:1–157 (West 1963); N. Y. Unconsol. Laws § 7101 (McKinney 1979)] is granted on the condition that venue . . . shall be laid within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District." N. J. Stat. Ann. § 32:1–162 (West 1963); N. Y. Unconsol. Laws § 7106 (McKinney 1979). This provision eliminates the danger, identified in *Atascadero State Hospital*, *supra*, and *Great Northern Life Ins. Co.*, *supra*, that federal courts may mistake a provision intended to allow suit in a State's own courts for a waiver of Eleventh Amendment immunity. Petitioner does not deny that the phrase "judicial district, established . . . by the United States" refers to the United States District Courts, but rather argues that the reference to venue cannot shape our construction of the general consent to suit provision. Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the provision directly indicates the extent of the States' waiver embodied in the consent provision. The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The venue provision expressly refers to and qualifies the more general consent to suit provision. Additionally, issues of venue are closely related to those concerning sovereign immunity, as this Court has indicated by emphasizing that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School*

and Hospital v. *Halderman*, 465 U. S., at 99. Petitioner's related argument that a venue provision cannot broaden the consent to suit provision begs the question what the States intended through the consent provision. The venue provision elucidates rather than broadens the consent to suit provision: It provides persuasive textual evidence that the consent to suit provision encompasses suits in federal court, and broadens the effect of the consent provision only to the extent of removing an ambiguity that called forth this Court's prudential canon of construction. The venue provision would hardly qualify "[t]he foregoing consent" unless the States intended that consent to include suits in federal court.

Finally, petitioner suggests no "reasonable construction," *Atascadero State Hospital*, 473 U. S., at 241, that might be given to the venue provision's phrase, "judicial district, established . . . by the United States," other than that the States consented to suit in federal court. See Brief for Petitioner 36–38; Tr. of Oral Arg. 15–16. We agree with the court below that the phrase cannot reasonably be construed as an ineffectual attempt to limit venue for suits for which Congress has abrogated the States' immunity. See 873 F. 2d, at 633; see also *Leadbeater*, 873 F. 2d, at 49 (declining to accept similar construction). *Amici curiae* supporting petitioner also confess their inability to provide any reasonable alternative construction of the phrase. Brief for Council of State Governments et al. as *Amici Curiae* 17. The Third Circuit, in the course of upholding petitioner's immunity defense in a similar suit, professed similar bafflement regarding the import of the venue provision. See *Leadbeater*, 873 F. 2d, at 49; *supra*, at 304. Petitioner essentially presents the choice between giving the venue provision its natural meaning and giving the provision no meaning at all. Charged with giving effect to the statute, we do not find the choice to be a difficult one.

We conclude that the statutory consent to suit provision, elucidated by the venue provision, establishes the States'

waiver of any Eleventh Amendment immunity that might otherwise bar respondents' suits against petitioner. The judgments of the Court of Appeals for the Second Circuit are therefore

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and concurring in the judgment.

While I agree with the Court that New York and New Jersey consented, on behalf of the Port Authority Trans-Hudson Corporation (PATH), to suit in federal court, I write separately to add that their consent is not necessary to our decision today. I do not join Part II of the Court's opinion[1] because it presupposes the validity of this Court's current characterization of the Eleventh Amendment as cloaking the States with sovereign immunity unless abrogated by Congress or waived by the States themselves. I adhere to my belief that this doctrine "rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 248 (1985) (BRENNAN, J., dissenting); see also *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 497 (1987) (BRENNAN, J., dissenting). Nevertheless, under either the Court's or my own view of the Eleventh Amendment,[2] PATH and similarly situated interstate entities may be subjected to suit in federal courts.

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[1] I join Part I of the opinion of the Court.

[2] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

I

Respondents seek to hold PATH liable under a variety of federal statutes for injuries they have suffered.[3] In my view, the States' consent is irrelevant to these suits for two reasons. First, the Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity. The Amendment did not constitutionalize some general notion of state sovereign immunity; it is a jurisdictional provision. Neither States nor Congress may consent to jurisdiction that is not provided and, therefore, the question is not waiver but reach. In my opinion, the Eleventh Amendment does not reach, and therefore does not bar, suits brought under federal-question or admiralty jurisdiction. See *Welch*, *supra*, at 504–516 (BRENNAN, J., dissenting); *Papasan* v. *Allain*, 478 U. S. 265, 292–293 (1986) (BRENNAN, J., concurring in part, concurring in judgment in part, and dissenting in part); *Green* v. *Mansour*, 474 U. S. 64, 78–79 (1985) (BRENNAN, J., dissenting); *Atascadero*, *supra*, at 252–302 (BRENNAN, J., dissenting); see also *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 23 (1989) (STEVENS, J., concurring).

Second, to the extent that States retain a common-law defense of state sovereign immunity, States surrendered that immunity, insofar as challenges under federal statutes are concerned, "'in the plan of the Convention'"[4] when they

[3] Both Patrick Feeney and Charles T. Foster asserted claims under the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.* (1982 ed.), the Boiler Inspection Act, 45 U. S. C. § 22 (1982 ed.), and the Safety Appliance Act, 45 U. S. C. § 1 (1982 ed.).

[4] The phrase is Alexander Hamilton's. He used it in a passage reassuring States, which might have been concerned with the securities they issued and might not have wished to honor, that the grant of diversity jurisdiction in Article III would not annul their defense of sovereign immunity should they be sued in federal court under state law on a writ of debt.

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the

agreed to form a union and granted Congress specifically enumerated powers. See *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 318–322 (1973) (BRENNAN, J., dissenting); see also *Pennsylvania* v. *Union Gas Co.*, *supra*, at 14 (plurality opinion) (quoting *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184, 191–192 (1964)). Neither the Eleventh Amendment nor the ancient doctrine of sovereign immunity, as I view them, would bar respondents' suits even had they been brought directly against New York or New Jersey because both suits allege violations of federal statutes. Thus, I would affirm the decisions below on that ground.

II

Even under the Court's current interpretation of the Eleventh Amendment, however, I do not believe that PATH had any defense to waive. The Eleventh Amendment bars federal jurisdiction only over suits "commenced or prosecuted against one of the United States." PATH is a subsidiary of the Port Authority of New York and New Jersey (Port Authority) which is a bistate agency created by interstate compact; it is not "one of the United States." By its terms, then, the Eleventh Amendment would appear to be inapplicable. But this Court has created two very limited exceptions to a literal reading of the phrase "one of the United States," so that immunity applies: (1) where the entity being sued is so intricately intertwined with the State that it can best be un-

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general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. *Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States.* . . . [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligations of good faith." The Federalist No. 81, p. 567 (H. Dawson ed. 1876) (second emphasis added).

derstood as an "arm of the State"; and (2) where the State, though not a nominal party, is the real party in interest. I believe that no bistate agency falls within the first exception and that no bistate agency falls within the second exception if, like the Port Authority, it is independently and solely liable for any judgments levied against it.[5]

A

The inherent nature of interstate agencies precludes their being found so intricately intertwined with the State as to constitute an "arm of the State." The Court developed the "arm-of-the-State" doctrine as a tool for determining which entities created by a State enjoy its Eleventh Amendment protection and which do not. This Court has found that a private suit against a state agency is barred by the Eleventh Amendment. See *Alabama* v. *Pugh*, 438 U. S. 781, 782 (1978) (reversing a lower court's decision to enjoin the State of Alabama and the Alabama Board of Corrections). Nonetheless, this Court has long held that counties and cities are not so integrally related to the State that they are shielded from suit in federal court. In *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890), the Court held that the Eleventh Amendment does not bar suit against counties in federal court, noting that the "Eleventh Amendment limits the jurisdiction [of the federal courts] only as to suits against a State." The Court continued: "[W]hile the county is territorially a

[5] This Court has twice before addressed the question whether a bistate entity could raise an Eleventh Amendment defense to federal jurisdiction, and twice rejected the specific immunity claim presented. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 279–280 (1959) (not reaching "arm-of-the-State" issue but finding that any Eleventh Amendment bar had been waived); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401–402 (1979) (finding subject to federal jurisdiction at least a bistate entity whose parent States disclaimed any immunity for it, whose compact failed to disclose any congressional intent to protect it from federal jurisdiction, and whose obligations were not binding on either parent State).

part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Ibid.* See also *Moor* v. *County of Alameda*, 411 U. S. 693, 721 (1973) (county); *Graham* v. *Folsom*, 200 U. S. 248, 255 (1906) (county); *Workman* v. *New York City*, 179 U. S. 552, 565–566 (1900) (city); cf. *Chicot County* v. *Sherwood*, 148 U. S. 529, 533–534 (1893) (rejecting state legislature's attempt to insulate county from federal jurisdiction by providing that county could only be sued in county courts).

In *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 280 (1977), the Court noted that "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations" and looked to the "nature of the entity created by state law" to determine whether local school boards in Ohio appeared to be more like a county or city or more like an arm of the State. The Court concluded that the school boards' extensive powers to issue bonds and levy taxes, and their categorization under state law as a form of political subdivision, rendered them "[o]n balance . . . more like a county or city." *Ibid.*

The rule to be derived from our cases is that the Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts, for instance a state agency. In contrast, when a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its "arms." This is so even though these political subdivisions exist solely at the whim and behest of their State. See, *e. g.*, *ibid; Graham* v. *Folsom*, *supra*, at 252.

Interstate agencies lack even this close link to any one State. While a State has plenary power to create and destroy its political subdivisions, a State enjoys no such hegemony over an interstate agency. To begin with, a State cannot create such an agency at will. In order to do so, it must persuade another State, or several other States, to join it. Moreover, the creation of an interstate agency requires each State to relinquish to one or more sister States a part of its sovereignty. The regulatory powers exercised by an interstate agency are powers no longer inhering in any one compacting State; they are powers shared. Likewise, no one State has complete dominion over property owned, and proprietary activities operated, by such an agency. For instance, in order to achieve the practical advantages of coordinated planning and administration through the Port Authority, New York and New Jersey each has ceded partial control over the regulation and operation of transportation facilities in its own State since 1921 and for the foreseeable future. In order to change the Port Authority's organization or powers, the legislatures of both States must pass a bill to that effect.

In addition, States may not create an interstate agency without the express approval of Congress; they surrendered their right to do so "in the plan of the Convention" when they accepted the Interstate Compact Clause. The Clause provides:

> "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State. . . ." U. S. Const., Art. I, § 10, cl. 3.

The Constitution also prohibits States from entering into any "Treaty, Alliance, or Confederation" either with other States or with foreign governments. Art. I, § 10, cl. 1.[6] The In-

[6] The Framers had serious concerns about this problem, as shown by their inclusion of provisions even stricter than those in the Articles of

terstate Compact Clause and the State Treaty Clause ensure that whatever sovereignty a State possesses within its own sphere of authority ends at its political border.[7]

Thus, it is not within the autonomous power of any State to create and regulate an interstate agency. Each State's sovereign will is circumscribed by that of the other States in the compact and circumscribed further by the veto power relinquished to Congress in the Constitution. If counties are not "arms" of their States merely because the State conferred a certain autonomy on them—an autonomy it can withdraw at

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Confederation. In the Articles of Confederation, the limitation on the "sovereignty, freedom and independence" retained by each State was:

"'No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue.'" Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 693–694 (1925) (quoting Art. VI, Articles of Confederation).

[7] That the Interstate Compact and State Treaty Clauses reflect a disfavor of intermediate-level sovereigns is well settled. See Frankfurter & Landis, *supra*, at 694 ("The absence of any powerful national capabilities on the part of the Confederacy, except in the conduct of foreign affairs, underlines the significance of these clauses [in the Articles of Confederation] as insurance against competing political power. This curb upon political combinations by the States was retained almost *in haec verba* by the Constitution"); V. Thursby, Interstate Cooperation, A Study of the Interstate Compact 4 (1953) (suggesting that one reason for the Compact Clause was that the Federal Government could be endangered by political combinations of the States); *Virginia* v. *Tennessee*, 148 U. S. 503, 518 (1893) (declaring that the compacts to which the Compact Clause refers are "those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their control"); *Barron* v. *Baltimore*, 7 Pet. 243, 248 (1833) (explaining that agreements between States for political purposes could "scarcely fail to interfere with the general purposes and intent of the [C]onstitution").

will—then an interstate agency, over which none of the compacting States exercises such untrammeled control, cannot be said to be an "arm" of any of them.[8]

B

Although this Court has held that a suit in which the State, rather than the nominal defendant, is the real party in interest is a suit against "one of the United States" within the meaning of the Eleventh Amendment, a State is the real party in interest generally only when the State is directly liable for a money judgment.[9] In *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 464 (1945), the Court held that a suit against a state treasury department and the individuals constituting its board for a refund of taxes

[8] *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979), is not inconsistent with this analysis. In that case, we noted that the Eleventh Amendment is available only to "'one of the United States,'" that its protection has never been extended to political subdivisions even though such entities exercise a "'slice of state power,'" and that there was "no justification for reading additional meaning into the limited language of the Amendment" so as to immunize a bistate agency unless Congress had indicated a desire to place the agency in a special position. *Id.*, at 400–401. The Court noted that neither of the States that created the bistate agency could veto its actions and observed that the conclusion that "TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." *Id.*, at 402.

[9] This Court has also found that the Eleventh Amendment bars a suit seeking equitable relief where a state officer defendant is not alleged to have acted contrary to state or federal law and the State is the real party in interest. See *Cory* v. *White*, 457 U. S. 85 (1982) (interpleader action). However, no State is a real party in interest in an action for prospective injunctive relief brought against an interstate agency, because any injunction would run against the agency, which is not an "arm of the State." See Part II–A, *supra*. Therefore, actions for prospective relief against an interstate agency would not be barred by the Eleventh Amendment, as the Court interprets it, whatever the agency's relationship to the States' treasuries. See generally *Ex parte Young*, 209 U. S. 123 (1908); *Quern* v. *Jordan*, 440 U. S. 332 (1979).

was a suit against the State because "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." This Court relied on that decision 30 years later in *Edelman* v. *Jordan*, 415 U. S., at 677, in holding that the Eleventh Amendment barred a suit brought in federal court in which the nominal defendants were Illinois officials because the relief sought was an injunction ordering retroactive payments of benefits from the state treasury. The Court observed that "the rule has evolved that a suit [in federal court] by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, at 663. See also *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (tax refund); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 (1944) (tax refund); *Smith* v. *Reeves*, 178 U. S. 436 (1900) (tax refund); see generally *Osborne* v. *Bank of United States*, 9 Wheat. 738 (1824) (rejecting an Eleventh Amendment defense because the nominal defendant, not the State, was the real party in interest).[10]

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[10] This Court has not decided which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest for Eleventh Amendment purposes. It may be that a simple indemnification clause, without more, does not trigger the doctrine. Lower courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment. See, *e. g.*, *Blaylock* v. *Schwinden*, 862 F. 2d 1352, 1354, n. 1 (CA9 1988) ("The eleventh amendment prohibits a district court from ordering payment of a judgment from the state treasury. The court may properly order the *officials* to pay damages under § 1983, but if the officials desire indemnification under the state statute, they must bring their own action in state court"); *Duckworth* v. *Franzen*, 780 F. 2d 645, 650–651 (CA7 1985) ("[T]he purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the State chooses to pick up the tab for its errant officers, its liability for their torts

Conversely, when a State is not liable for the obligations of an interstate agency, it is not a real party in interest in a suit against that agency. The court below found that no State is liable for PATH's obligations. It concluded:

> "We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of either state or from borrowing money in any name but its own. Even the provision [permitting] the appropriation of moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation [by the legislature] before obligations for such expenses may be incurred. Moreover, the [provision's] phrase 'salaries, office and other adminstrative expenses' clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority." 873 F. 2d 628, 631 (CA2 1989).

Therefore neither New York nor New Jersey is a real party in interest in respondents' suits, as this Court has understood and applied the concept in the Eleventh Amendment area.

C

This is not to say that the only restriction on whether an interstate agency can be sued in federal court is the Eleventh

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is voluntary. . . . Moreover, it would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual except against employees of local governments . . . was to promise to indemnify state employees for any damages awarded in such a suit"); *Wilson* v. *Beebe*, 770 F. 2d 578, 588 (CA6 1985) ("State cannot clothe [state officer] with [Eleventh Amendment] immunity by voluntarily agreeing to pay any judgment rendered against him").

Amendment. Congress may provide an interstate agency with an affirmative defense to its federal statutory obligations as Congress wishes, subject only to independent constitutional strictures such as the Equal Protection Clause. Congress would ordinarily be expected to address the matter through a specific statutory provision. It may also be that a court could legitimately infer Congress' intention to provide such a defense from its consent to an interstate compact the terms of which patently attempt to grant immunity from suit in federal court. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401 (1979).

But it cannot be disputed that there is no such showing here. Congress has not passed any law conferring any immunity on the Port Authority. Nor did the compact to which Congress consented include any provision attempting to grant immunity from suit in federal court. Consequently, I believe that this Court, following its current view of the Eleventh Amendment, could have rested its decision today on the absence of an Eleventh Amendment defense as well as on waiver.

DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* STOKES

ON APPLICATION TO VACATE STAY

No. A–795. Decided May 11, 1990

After respondent Stokes was convicted and sentenced to death in Missouri, he filed three unsuccessful habeas corpus petitions in the federal courts. A few days before his scheduled execution, he filed an application for stay of execution pending consideration of a fourth habeas petition. The District Court found that the imposition of a stay was warranted by the issues raised in his claim that the state courts had selectively applied the rules governing lesser included offense instructions in capital murder cases in violation of his right to equal protection. The Court of Appeals denied the State's motion to vacate the stay.

Held: The District Court abused its discretion in granting the stay. A stay of execution pending disposition of a second or successive federal habeas petition can be granted only when there are substantial grounds upon which relief can be granted. Here, there are no such grounds, because Stokes' fourth petition clearly constitutes an abuse of the writ. His claim could have been raised in his first petition for federal habeas, and the principles he asserts are not novel and could have been developed long before this application.

Motion granted.

PER CURIAM.

The State of Missouri has issued a warrant for the execution of Winford Stokes, which expires at 11:59 p.m. CDT on May 11, 1990. Stokes was convicted of capital murder in 1979 and sentenced to death. His conviction and sentence were affirmed by the Missouri Supreme Court. *State* v. *Stokes*, 638 S. W. 2d 715 (1982) (en banc). Stokes has since filed three separate petitions for a writ of habeas corpus in the federal courts, each of which was denied. See *Stokes* v. *Armontrout*, 851 F. 2d 1085 (CA8 1988), cert. denied, 488 U. S. 1019 (1989); *Stokes* v. *Armontrout*, 893 F. 2d 152 (CA8 1989), stay of execution denied, *post*, p. 926; *Stokes* v. *Armontrout*, No. 89–0133C(6) (ED Mo., Mar. 16, 1990). On

May 10, 1990, this Court denied a stay of execution pending the filing and disposition of a petition for certiorari relating to one of Stokes' first three habeas petitions. *Post*, p. 926.

While his application for stay of execution was pending in this Court, and within a matter of days before the scheduled execution, Stokes filed in the District Court a new application for stay of execution pending consideration of a fourth federal habeas petition. On the afternoon of May 9, the District Court granted a stay of execution, stating that "the issues raised by petitioner's claim that his right to equal protection of the laws was violated by the Missouri state courts' selective application of the rules governing lesser included offense instructions in capital murder cases warrant the imposition of a stay of execution. *See Williams* v. *Armontrout*, 891 F. 2d 656, 658–59 (8th Cir. 1989), *vacated upon grant of rehearing en banc* (February 7, 1990)." No. 90–0505C(6) (ED Mo.). On the morning of May 11, a panel of the Court of Appeals for the Eighth Circuit denied the State's motion to vacate the stay, one judge dissenting. The State then asked the en banc Court of Appeals to vacate the stay. That motion was also denied. The State has now filed with this Court an application to vacate the stay of execution.

A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are "substantial grounds upon which relief might be granted." *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). There are no "substantial grounds" present in this case, because respondent's fourth federal habeas petition clearly constitutes an abuse of the writ. See 28 U. S. C. § 2254 Rule 9(b); 28 U. S. C. § 2244(b). Stokes' claim that he was entitled to a lesser included offense instruction, and that the Missouri Supreme Court has selectively applied its rules relating to that claim, could have been raised in his first petition for federal habeas corpus. The equal protection principles asserted by respondent are not novel and could have been de-

veloped long before this last minute application for stay of execution. Indeed, Stokes himself cites dissenting opinions filed in the Missouri Supreme Court in 1983 to support his contention. See, *e. g.*, *State* v. *Holland*, 653 S. W. 2d 670, 679 (en banc) (Welliver, J., dissenting).

The fourth federal habeas petition now pending in the District Court "is another example of abuse of the writ." *Woodard* v. *Hutchins*, 464 U. S. 377, 378–380 (1984) (Powell, J., concurring, joined by four other Justices) (vacating stay of execution where claims in a successive petition could, and should, have been raised in a first petition for federal habeas corpus). The District Court abused its discretion in granting a stay of execution. The application to vacate the stay is granted.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring.

I join in the opinion of the Court. The more than 24-hour delay in the Court of Appeals' ruling on the State's motion to vacate the stay granted on this fourth successive petition, one which discloses no substantial ground for relief, makes appropriate some additional comments.

In this case, execution was scheduled for 12:01 a.m. CDT on May 11, 1990, under a warrant which expires, as the Court indicates, at 11:59 p.m. CDT on May 11, 1990. The Eighth Circuit found itself unable to rule on a motion to vacate a District Court stay until midafternoon on Friday, May 11. All courts of appeals should consider implementing, and following, procedures, such as those employed by the Eleventh Circuit, see Rule 22–3, Rules of the United States Court of Appeals for the Eleventh Circuit (1987), to make certain that three active judges are available to act upon emergency stays of this sort and to provide a timely ruling from the panel as a body, so that this Court may also rule upon the case where necessary and appropriate.

If the court of appeals fails to act in a manner sufficiently prompt to preserve the jurisdiction of the court and to protect the parties from the consequences of a stay entered without an adequate basis, an injured party may seek relief in this Court pursuant to our jurisdiction under the All Writs Act, 28 U. S. C. § 1651. See *Maxwell* v. *Bishop*, 385 U. S. 650 (1967) (common-law petition for writ of certiorari granted where shortness of time available before a scheduled execution made ordinary appeal procedure unavailable).

Delay or default by courts in the federal system must not be allowed to deprive parties, including States, of the lawful process to which they are entitled. It is the duty of the courts of appeals to adopt and follow procedures which ensure all parties expeditious determinations with respect to any request for a stay. Prompt review and determination is necessary to enable criminal processes to operate without undue interference from the federal courts, and to assure the proper functioning of the federal habeas procedure.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins and JUSTICE BLACKMUN joins as to Parts I, II, and III, dissenting.

I

Today the Court vacates a stay of execution entered by the United States District Court for the Eastern District of Missouri and found to be within that court's discretion by the United States Court of Appeals for the Eighth Circuit, sitting en banc. Contrary to the majority's intimations, this case does not involve a last minute stay application by a defendant on the eve of his execution. Rather, Winford Stokes raised an equal protection claim in an amendment to a petition for writ of habeas corpus pending in the District Court on April 5, 1990, before the current execution date had been set.* The rush to judgment is instigated here by the

*At that time, a stay of execution was in effect pending review by the Eighth Circuit of the District Court's denial of a previous habeas peti-

State's insistence on vacating the District Court's grant of a stay to consider Mr. Stokes' claim.

"In lifting the stay imposed by the Court of Appeals, the Court has resorted to an exercise of power that is unusual and that should only be resorted to on the rare occasion in which a lower court has flagrantly abused its discretion." *Wainwright* v. *Adams*, 466 U. S. 964, 965 (1984). The Court does so on the basis of a rule that quite properly vests considerable discretion in the court most familiar with the facts of the case and its prior history. Title 28 U. S. C. § 2254 Rule 9(b) provides that:

> "A second or successive petition *may* be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (Emphasis added.)

The judge to whom Mr. Stokes applied for a writ of habeas corpus did not choose to dismiss on such grounds. To the contrary, Judge George F. Gunn found that:

> "Upon thorough consideration of the record before it, the Court concludes that the issues raised by petitioner's claim that his right to equal protection of the laws was violated by the Missouri state courts' selective application of the rules governing lesser included offense instructions in capital murder cases warrant the imposition of a stay of execution."

This Court has said repeatedly that the principles governing the disposition of successive writs "are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies . . . . We are confident that

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tion. This stay was dissolved by the Court of Appeals on April 24. On April 27, the Missouri Supreme Court set Stokes' execution date for May 11.

this power will be soundly applied." *Sanders* v. *United States*, 373 U. S. 1, 18–19 (1963). See also *Wainwright* v. *Booker*, 473 U. S. 935, 938 (1985) (MARSHALL, J., dissenting) ("[T]he lower court's decision is 'deserving of great weight'"). Judge Gunn is particularly well situated to exercise the discretion Congress has entrusted to him. He has heard three of Mr. Stokes' habeas applications, attending to the complex issues and detailed facts of Mr. Stokes' conviction over several years.

The Eighth Circuit, also closer to this case than we could hope to be in the few hours we have had to consider the matter, found the District Court's order sound and responsible. The Court of Appeals similarly is due considerable deference. See *Barefoot* v. *Estelle*, 463 U. S. 880, 896 (1983) ("A stay of execution should first be sought from the court of appeals, and this Court generally places considerable weight on the decision reached by the courts of appeals in these circumstances"); *O'Connor* v. *Board of Education of School District 23*, 449 U. S. 1301, 1304 (1980) (STEVENS, J., in chambers) ("A Court of Appeals' decision to enter a stay is entitled to great deference"). Nonetheless, this Court has decided that both the District Court and the Court of Appeals have committed such gross abuses of discretion that this Court must intervene. Nothing in the Court's opinion explains adequately why the lower courts have been adjudged so harshly.

II

The Court vacates the stay granted by the District Court because in this Court's judgment, Mr. Stokes' claim "could have been developed long before this last minute application for stay of execution." *Ante*, at 321–322. I do not share the Court's confidence in the matter. While the "equal protection *principles* asserted" by Mr. Stokes are hardly novel, *ibid.* (emphasis added)—indeed, they date back to 1868—the nature of Mr. Stokes' *claim* is a different matter.

To determine whether the claim is novel, we must begin by defining what it *is*. The lower courts have not ruled on the merits of Mr. Stokes' claim. Rather, they in effect have held his case in abeyance pending resolution of *Williams* v. *Armontrout*, 891 F. 2d 656 (1989); in this case, the Eighth Circuit, sitting en banc, is reviewing a panel decision that the selective application by Missouri courts of the decision in *State* v. *Baker*, 636 S. W. 2d 902, 904–905 (1982) (en banc), cert. denied, 459 U. S. 1183 (1983), "denies similarly situated defendants in capital murder cases equal protection of the law in violation of the fourteenth amendment of the United States Constitution." 891 F. 2d, at 659. Given that the Eighth Circuit has not determined definitively the contours of the equal protection claim, it is impossible to say at this time whether the claim constitutes a "novel" one.

Even if we could ascertain the precise character of the claim, in order to decide whether it could have been raised in a previous habeas petition we also would have to engage in a comprehensive review of Missouri state cases over the past decade. The Court today does not even purport to do this. In other contexts, the Court has noted that whether a legal claim is a "novel" one depends on an inquiry into existing precedents. Cf. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) (that claim is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision" does not prevent it from being a "new rule" for purposes of retroactivity). Thus, the mere fact that the Court today can point to an opinion of a dissenting Missouri Supreme Court Justice in 1983 hardly establishes that Mr. Stokes' claim is not "novel."

III

When a person's life is at stake we cannot tolerate such facile judgments. I would rather rely on the considered wisdom of the courts below, aided by their familiarity with Missouri law, that Mr. Stokes' claim cannot be decided until *Williams* is resolved. Given the dire consequences of error,

the Court's rush to judgment is unseemly and indefensible. See *Woodard* v. *Hutchins*, 464 U. S. 377, 382–383 (1984) (BRENNAN, J., dissenting); *id.*, at 384 (MARSHALL, J., dissenting). There is no call to deny a district court the time it needs to consider properly a petitioner's claim. "It is . . . important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law." *Rosenberg* v. *United States*, 346 U. S. 273, 321 (1953) (Douglas, J., dissenting).

IV

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would deny the application to vacate the stay entered by the District Court.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In my opinion both the District Court and the Court of Appeals—particularly when acting en banc—are in a far better position than this Court to determine whether a successive petition for habeas corpus constitutes an abuse of the writ. Accordingly, I respectfully dissent from the Court's summary disposition of the application to vacate the stay entered by the District Court and upheld by the Court of Appeals.

ATLANTIC RICHFIELD CO. *v.* USA PETROLEUM CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–1668. Argued December 5, 1989—Decided May 14, 1990

Petitioner Atlantic Richfield Company (ARCO), an integrated oil company, increased its retail gasoline sales and market share by encouraging its dealers to match the prices of independents such as respondent USA Petroleum Company, which competes directly with the dealers at the retail level. When USA's sales dropped, it sued ARCO in the District Court, charging, *inter alia*, that the vertical, maximum-price-fixing scheme constituted a conspiracy in restraint of trade in violation of § 1 of the Sherman Act. The court granted summary judgment to ARCO, holding that USA could not satisfy the "antitrust injury" requirement for purposes of a private damages suit under § 4 of the Clayton Act because it was unable to show that ARCO's prices were predatory. The Court of Appeals reversed, holding that injuries resulting from vertical, nonpredatory, maximum-price-fixing agreements could constitute "antitrust injury." Reasoning that any form of price fixing contravenes Congress' intent that market forces alone determine what goods and services are offered, their prices, and whether particular sellers succeed or fail, the court concluded that USA had shown that its losses resulted from a disruption in the market caused by ARCO's price fixing.

Held:

1. Actionable "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Injury, although causally related to an antitrust violation, will not qualify unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104, 109–110. P. 334

2. A vertical, maximum-price-fixing conspiracy in violation of § 1 of the Sherman Act must result in predatory pricing to cause a competitor antitrust injury. Pp. 335–341.

(a) As a competitor, USA has not suffered "*antitrust* injury," since its losses do not flow from the harmful effects on dealers and consumers that rendered vertical, maximum price fixing *per se* illegal in *Albrecht* v. *Herald Co.*, 390 U. S. 145. USA was benefited rather than harmed if ARCO's pricing policies restricted ARCO's sales to a few large dealers

or prevented its dealers from offering services desired by consumers. Even if the maximum price agreement acquired all of the attributes of a minimum-price-fixing scheme, USA still would not have suffered antitrust injury, because higher ARCO prices would have worked to USA's advantage. Pp. 335–337.

(b) USA's argument that, even if it was not harmed by any of the *Albrecht* anticompetitive effects, its lost business caused by ARCO's agreement lowering prices to above predatory levels constitutes antitrust injury is rejected, since cutting prices to increase business is often the essence of competition. Pp. 337–338.

(c) It is not inappropriate to require a showing of predatory pricing before antitrust injury can be established in a case under § 1 of the Sherman Act. Although under § 1 the price agreement itself is illegal, all losses flowing from the agreement are not by definition antitrust injuries. Low prices benefit consumers regardless of how they are set. So long as they are above predatory levels, they do not threaten competition and, hence, cannot give rise to antitrust injury. Pp. 338–341.

3. A loss flowing from a *per se* violation of § 1 does not automatically satisfy the antitrust injury requirement, which is a distinct matter that must be shown independently. The purpose of *per se* analysis is to determine whether a particular restraint is unreasonable. Actions *per se* unlawful may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. The antitrust injury requirement, however, ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. Pp. 341–345.

4. Providing competitors with a private cause of action to enforce the rule against vertical, maximum price fixing would not protect the rights of dealers and consumers—the class of persons whose self-interest would normally motivate them to vindicate *Albrecht*'s anticompetitive consequences—under the antitrust laws. USA's injury is not inextricably intertwined with a dealer's antitrust injury, since a competitor has no incentive to vindicate the legitimate interests of a rival's dealer and will be injured and motivated to sue only when the arrangement has a procompetitive impact on the market. Pp. 345–346.

859 F. 2d 687, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 346.

Ronald C. Redcay argued the cause for petitioner. With him on the briefs were *Matthew T. Heartney*, *Otis Pratt Pearsall*, *Philip H. Curtis*, *Francis X. McCormack*, *Donald A. Bright*, and *Edward E. Clark*.

John G. Roberts, Jr., argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Boudin*, *Deputy Solicitor General Shapiro*, *Michael R. Dreeben*, *Catherine G. O'Sullivan*, and *Kevin J. Arquit*.

Maxwell M. Blecher argued the cause for respondent. With him on the brief were *Alicia G. Rosenberg* and *Lawrence A. Sullivan*.*

**Daniel K. Mayers*, *David Westin*, and *W. Terry Maguire* filed a brief for the American Newspaper Publishers Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Andrea S. Ordin*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, and *Thomas P. Dove* and *Richard N. Light*, Deputy Attorneys General, *Douglas B. Baily*, Attorney General of Alaska, and *Richard D. Monkman*, Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, *Thomas J. Miller*, Attorney General of Iowa, and *Gordan E. Allen*, Deputy Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Anne F. Benoit*, Assistant Attorney General, *Robert M. Spire*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, and *J. Kenneth Creighton*, Deputy Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Eugene F. Wayne*, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, *Charles W. Burson*, Attorney General of Tennessee, and *Terry Craft*, Deputy Attorney General, *R. Paul Van Dam*, Attorney General of Utah, and *Arthur M. Strong*, Assistant Attorney General; for the Service Station Dealers of America by *Dimitri G. Daskalopoulos;* and for the Society of Independent Gasoline Marketers of America by *William W. Scott* and *Christopher J. MacAvoy*.

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether a firm incurs an "injury" within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme. We hold that such a firm does not suffer an "antitrust injury" and that it therefore cannot bring suit under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15.[1]

I

Respondent USA Petroleum Company (USA) sued petitioner Atlantic Richfield Company (ARCO) in the United States District Court for the Central District of California, alleging the existence of a vertical, maximum-price-fixing agreement prohibited by § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, an attempt to monopolize the local retail gasoline sales market in violation of § 2 of the Sherman Act, 15 U. S. C. § 2, and other misconduct not relevant here. Petitioner ARCO is an integrated oil company that, *inter alia*, markets gasoline in the Western United States. It sells gasoline to consumers both directly through its own stations and indirectly through ARCO-brand dealers. Respondent USA is an independent retail marketer of gasoline which, like other independents, buys gasoline from major petroleum companies for resale under its own brand name. Respondent competes directly with ARCO dealers at the retail level. Respondent's outlets typically are low-overhead, high-volume "discount" stations that charge less than stations selling equivalent quality gasoline under major brand names.

In early 1982, petitioner ARCO adopted a new marketing strategy in order to compete more effectively with discount

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[1] Section 4 of the Clayton Act is a remedial provision that makes available treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

independents such as respondent.[2] Petitioner encouraged its dealers to match the retail gasoline prices offered by independents in various ways; petitioner made available to its dealers and distributors such short-term discounts as "temporary competitive allowances" and "temporary volume allowances," and it reduced its dealers' costs by, for example, eliminating credit card sales. ARCO's strategy increased its sales and market share.

In its amended complaint, respondent USA charged that ARCO engaged in "direct head-to-head competition with discounters" and "drastically lowered its prices and in other ways sought to appeal to price-conscious consumers." First Amended Complaint ¶19, App. 15. Respondent asserted that petitioner conspired with retail service stations selling ARCO brand gasoline to fix prices at below-market levels: "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels." ¶27, App. 17. Respondent alleged that petitioner "has solicited its dealers and distributors to participate or acquiesce in the conspiracy and has used threats, intimidation and coercion to secure compliance with its terms." ¶37, App. 19. According to respondent, this conspiracy drove many independent gasoline dealers in California out of business. ¶39, App. 20. Count one of the amended complaint charged that petitioner's vertical, maximum-price-fixing scheme constituted an agreement in restraint of trade and thus violated § 1 of the Sherman Act. Count two, later withdrawn with prejudice by respondent,

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[2] Because the case comes to us on review of summary judgment, "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986) (quoting *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962)).

asserted that petitioner had engaged in an attempt to monopolize the retail gasoline market through predatory pricing in violation of § 2 of the Sherman Act.[3]

The District Court granted summary judgment for ARCO on the § 1 claim. The court stated that "[e]ven assuming that [respondent USA] can establish a vertical conspiracy to maintain low prices, [respondent] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory." App. to Pet. for Cert. 3b. The court then concluded that respondent could make no such showing of predatory pricing because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 859 F. 2d 687 (1988). Acknowledging that its decision was in conflict with the approach of the Court of Appeals for the Seventh Circuit in several recent cases,[4] see *id.*, at 697, n. 15, the Ninth Circuit nonetheless held that injuries resulting from vertical, nonpredatory, maximum-price-fixing agreements could constitute "antitrust injury" for purposes of a private suit under § 4 of the Clayton Act. The court reasoned that any form of price fixing contravenes Congress' intent that "market forces alone determine what goods and services are offered, at what price these goods and serv-

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[3] The District Court granted petitioner's motion to dismiss the § 2 claim as originally pleaded. 577 F. Supp. 1296, 1304 (1983). Respondent subsequently amended its § 2 claim, but shortly after petitioner filed for summary judgment, respondent voluntarily dismissed that claim with prejudice. See App. 76–78. The Court of Appeals framed the issue as "whether a competitor's injuries resulting from vertical, *non-predatory*, maximum price fixing fall within the category of 'antitrust injury.'" 859 F. 2d 687, 689 (CA9 1988) (emphasis added). For purposes of this case we likewise assume that petitioner's pricing was not predatory in nature.

[4] See *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F. 2d 1409, 1418–1420 (1989); *Local Beauty Supply, Inc.* v. *Lamaur, Inc.*, 787 F. 2d 1197, 1201–1203 (1986); *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F. 2d 698, 708–709, cert. denied, 469 U. S. 1018 (1984).

ices are sold, and whether particular sellers succeed or fail." *Id.*, at 693. The court believed that the key inquiry in determining whether respondent suffered an "antitrust injury" was whether its losses "resulted from a disruption . . . in the . . . market caused by the . . . antitrust violation." *Ibid.* The court concluded that "[i]n the present case, the inquiry seems straightforward: USA's claimed injuries were the direct result, and indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." *Ibid.*

We granted certiorari, 490 U. S. 1097 (1989).

II

A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing "injury causally linked to an illegal presence in the market." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977). Instead, a plaintiff must prove the existence of *"antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Ibid.* (emphasis in original). In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986), we reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "since '[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." *Id.*, at 109–110 (quoting *Brunswick*, *supra*, at 488). See also *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 539–540 (1983); *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465, 483, and n. 19 (1982); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 562 (1981).

Respondent argues that, as a competitor, it can show antitrust injury from a vertical conspiracy to fix maximum prices that is unlawful under § 1 of the Sherman Act, even if the prices were set above predatory levels. In addition, respondent maintains that any loss flowing from a *per se* violation of § 1 automatically satisfies the antitrust injury requirement. We reject both contentions and hold that respondent has failed to meet the antitrust injury test in this case. We therefore reverse the judgment of the Court of Appeals.

A

In *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), we found that a vertical, maximum-price-fixing scheme was unlawful *per se* under § 1 of the Sherman Act because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum-price-fixing scheme.[5] That case concerned a newspaper distributor who sought to charge his customers more than the suggested retail price advertised by the publisher. After the publisher attempted to discipline the distributor by hiring another carrier to take away some of the distributor's customers, the distributor brought suit under § 1. The Court found that "the combination formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of newspapers which he had purchased from [the publisher] constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act." *Id.*, at 153.

In holding such a maximum-price vertical agreement illegal, we analyzed the manner in which it might restrain competition by dealers. First, we noted that such a scheme, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." *Id.*, at 152. We further explained that "[m]axi-

[5] We assume, *arguendo*, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule.

mum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.*, at 152–153. By limiting the ability of small dealers to engage in nonprice competition, a maximum-price-fixing agreement might "channel distribution through a few large or specifically advantaged dealers." *Id.*, at 153. Finally, we observed that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Ibid.*

Respondent alleges that it has suffered losses as a result of competition with firms following a vertical, maximum-price-fixing agreement. But in *Albrecht* we held such an agreement *per se* unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*. Respondent's asserted injury as a competitor does not resemble any of the potential dangers described in *Albrecht*.[6] For example, if a vertical agreement fixes "[m]aximum prices . . . too low for the dealer to furnish services" desired by consumers, or in such a way as to channel business to large distributors, *id.*, at 152–153, then a firm dealing in a competing brand would not be harmed. Respondent was *benefited* rather than harmed if petitioner's pricing policies restricted ARCO

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[6] *Albrecht* is the only case in which the Court has confronted an unadulterated vertical, maximum-price-fixing arrangement. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 213 (1951), we also suggested that such an arrangement was illegal because it restricted vigorous competition among dealers. The restraint in *Kiefer-Stewart* had an additional horizontal component, however, see *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 348, n. 18 (1982), since the agreement was between two suppliers that had agreed to sell liquor only to wholesalers adhering to "maximum prices above which the wholesalers could not resell." *Kiefer-Stewart*, *supra*, at 212.

sales to a few large dealers or prevented petitioner's dealers from offering services desired by consumers such as credit card sales. Even if the maximum-price agreement ultimately had acquired all of the attributes of a minimum-price-fixing scheme, respondent still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor "may not complain of conspiracies that . . . set minimum prices at *any* level." *Matsushita Electric Industrial Corp.* v. *Zenith Radio Corp.*, 475 U. S. 574, 585, n. 8 (1986); see also *id.*, at 582–583 ("[R]espondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the . . . market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . ."). Indeed, the gravamen of respondent's complaint—that the price-fixing scheme between petitioner and its dealers enabled those dealers to increase their sales—amounts to an assertion that the dangers with which we were concerned in *Albrecht* have *not* materialized in the instant case. In sum, respondent has not suffered "*antitrust* injury," since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal.

Respondent argues that even if it was not harmed by any of the anticompetitive effects identified in *Albrecht*, it nonetheless suffered antitrust injury because of the low prices produced by the vertical restraint. We disagree. When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation.[7] A firm

[7] The Court of Appeals implied that the antitrust injury requirement could be satisfied by a showing that the "long-term" effect of the maximum-price agreements could be to eliminate retailers and ultimately to reduce competition. 859 F. 2d, at 694, 696. We disagree. Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless

complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1554 (1989). This is not *antitrust* injury; indeed, "cutting prices in order to increase business often is the very essence of competition." *Matsushita*, *supra*, at 594. The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962) (emphasis in original). "To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U. S., at 116.

Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2. Respondent notes that the two sections of the Act are quite different. Price fixing violates § 1, for example, even if a single firm's decision to price at the same level would not create § 2 liability. See generally *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 767–769 (1984). In a § 1 case, the price agreement itself is illegal, and respondent contends that all losses flowing from such an agreement must by definition constitute "antitrust injuries." Respondent observes that § 1 in general and the *per se* rule in particular are grounded "'on faith in price competition as a market force

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they are relatively inefficient. Even if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is "ruinous." Cf. *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610–612 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 220–221 (1940). "[T]he statutory policy precludes inquiry into the question whether competition is good or bad." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978).

[and not] on a policy of low selling prices at the price of eliminating competition.'" *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 348 (1982) (quoting Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962)). In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act.

We reject respondent's argument. Although a vertical, maximum-price-fixing agreement is unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing.[8] Antitrust injury does not arise for purposes of § 4 of the Clayton Act, see n. 1, *supra*, until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick*, 429 U. S., at 487; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.[9] See Areeda & Turner, Predatory Pricing and Related

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[8] The Court of Appeals erred by reasoning that respondent satisfied the antitrust injury requirement by alleging that "[t]he removal of some elements of price competition distorts the markets, and harms all the participants." 859 F. 2d, at 694. Every antitrust violation can be assumed to "disrupt" or "distort" competition. "[O]therwise, there would be no violation." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 340.3b, p. 411 (1989 Supp.). Respondent's theory would equate injury in fact with antitrust injury. We declined to adopt such an approach in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), and *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986), and we reject it again today. The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

[9] This is not to deny that a vertical price-fixing scheme may facilitate predatory pricing. A supplier, for example, can reduce its prices to its own downstream dealers and share the losses with them, while forcing competing dealers to bear by themselves the full loss imposed by the lower prices. Cf. *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 522 (1963). But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement.

Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 697–699 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 292–294 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

We have adhered to this principle regardless of the type of antitrust claim involved. In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, for example, we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed to be illegal under § 7 of the Clayton Act, even though the merged company threatened to engage in vigorous price competition that would reduce the plaintiff's profits. We observed that nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, "is not activity forbidden by the antitrust laws." 479 U. S., at 116. Because the prices charged were not predatory, we found no antitrust injury. Similarly, we determined that antitrust injury was absent in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, even though the plaintiffs alleged that an illegal acquisition threatened to bring a "'deep pocket' parent into a market of 'pygmies,'" *id.*, at 487, a scenario that would cause the plaintiffs economic harm. We opined nevertheless that "if [the plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws': while [the plaintiffs'] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.*, at 488. To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful under § 1 of the Sherman Act rather than a merger in violation of § 7 of the Clayton Act. But that difference is not salient. When prices are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of the de-

fendant's conduct.[10] "'It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'" *Cargill*, 479 U. S., at 116 (quoting *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F. 2d 1050, 1057 (CA6), cert. denied, 469 U. S. 1036 (1984)).[11]

B

We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The

[10] We did not reach a contrary conclusion in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), where we declined to define precisely the term "predatory pricing" but stated instead that "[f]or purposes of this case it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id.*, at 585, n. 8. This statement does not imply that losses from *non*predatory pricing might qualify as antitrust injury; we were quite careful to limit our discussion in that case to *predatory* pricing. See *ibid.* (nonpredatory prices would not cause antitrust injury because they would "leave respondents in the same position as would market forces"). We noted that "[e]xcept for the alleged conspiracy to monopolize the . . . market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an 'antitrust injury.'" *Id.*, at 586. We also observed that "respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury." *Id.*, at 584, n. 7 (citations omitted); see also *id.*, at 594; *Cargill*, *supra*, at 117, n. 12 (interpreting our decision in *Matsushita*). We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita* that predatory pricing might consist of "pricing below the level necessary to sell [the offender's] products," 475 U. S., at 585, n. 8, is an accurate statement of the law. See n. 3, *supra*.

[11] The Court of Appeals purported to distinguish *Cargill* and *Brunswick* on the ground that those cases turned on an "attenuated or indirect" relationship between the alleged violation—the illegal merger—and the plaintiffs' injury. 859 F. 2d, at 695. We disagree. The Court in both cases described the injury as flowing directly from the alleged antitrust violation. See *Cargill*, *supra*, at 108; *Brunswick*, *supra*, at 487.

per se rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act. *Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," *i. e.*, whether its anticompetitive effects outweigh its procompetitive effects.[12] The *per se* rule is a presumption of unreasonableness based on "business certainty and litigation efficiency." *Arizona* v. *Maricopa County Medical Society*, 457 U. S., at 344. It represents a "longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 433 (1990) (quoting *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 16 (1984)). "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Maricopa County Medical Society*, *supra*, at 344.

The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief. Actions *per se* unlawful under the antitrust laws may nonetheless have *some* procompetitive effects, and private parties might suffer losses

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[12] "Both *per se* rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.'" *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U. S. 85, 103 (1984) (quoting *National Society of Professional Engineers* v. *United States*, 435 U. S., at 692). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." 468 U. S., at 104.

therefrom.[13] See *Maricopa County Medical Society, supra,* at 351; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977). Conduct in violation of the anti-

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[13] When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales—whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price fixing thus may have procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers. See *Albrecht* v. *Herald Co.*, 390 U. S. 145, 159 (1968) (Harlan, J., dissenting) (maximum price ceilings "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition," by "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits"). Indeed, we acknowledged in *Albrecht* that "[m]aximum and minimum price fixing may have different consequences in many situations." *Id.*, at 152. The procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968. See *id.*, at 154; *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 375–376 (1967). These agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely. See *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 47–59 (1977).

Many commentators have identified procompetitive effects of vertical, maximum price fixing. See, *e. g.*, P. Areeda & H. Hovenkamp, Antitrust Law ¶340.3b, p. 378, n. 24 (1988 Supp.); Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1553 (1989); Blair & Schafer, Evolutionary Models of Legal Change and the *Albrecht* Rule, 32 Antitrust Bull. 989, 995–1000 (1987); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, part 2, 75 Yale L. J. 373, 464 (1966); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 887–890 (1981); Hovenkamp, Vertical Integration by the Newspaper Monopolist, 69 Iowa L. Rev. 451, 452–456 (1984); Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Cleveland State L. Rev. 179, 216–217 (1989); Turner, The Durability, Relevance, and Future of American Antitrust Policy, 75 Calif. L. Rev. 797, 803–804 (1987).

trust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. Indeed, insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored. "[P]ro-competitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." Page, The Scope of Liability for Antitrust Violations, 37 Stan. L. Rev. 1445, 1460 (1985). Thus, "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." P. Areeda & H. Hovenkamp, Antitrust Law ¶334.2c, p. 330 (1989 Supp.).

For this reason, we have previously recognized that even in cases involving *per se* violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury. For example, in a case involving horizontal price fixing, "perhaps the paradigm of an unreasonable restraint of trade," *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U. S. 85, 100 (1984), we observed that the plaintiffs were still required to "show that the conspiracy caused *them* an injury for which the antitrust laws provide relief." *Matsushita*, 475 U. S., at 584, n. 7 (citing *Brunswick*) (emphasis added). Similarly, in *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519 (1983), we noted that a restraint of trade was illegal *per se* in the sense that it could "be condemned even without proof of its actual market effect," but we maintained that even if it "may have

been unlawful, it does not, of course, necessarily follow that still another party . . . is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." *Id.*, at 528–529.

C

We decline to dilute the antitrust injury requirement here because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price fixing. If such a scheme causes the anticompetitive consequences detailed in *Albrecht*, consumers and the manufacturers' own dealers may bring suit. The "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated General Contractors*, *supra*, at 542.

Respondent's injury, moreover, is not "inextricably intertwined" with the antitrust injury that a dealer would suffer, *McCready*, 457 U. S., at 484, and thus does not militate in favor of permitting respondent to sue on behalf of petitioner's dealers. A competitor is not injured by the *anticompetitive* effects of vertical, maximum price-fixing, see *supra*, at 336–337, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 33–39 (1984). A competitor will not bring suit to protect the dealer against a maximum price that is set too low, inasmuch as the competitor would *benefit* from such a situation. Instead, a competitor will be motivated to bring suit only when the vertical restraint promotes interbrand competition between the competitor and the dealer subject to the restraint. See n. 13, *supra*. In short, a competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a *procompetitive* impact on the market. Therefore, pro-

viding the competitor a cause of action would not protect the rights of dealers and consumers under the antitrust laws.

III

Respondent has failed to demonstrate that it has suffered any antitrust injury. The allegation of a *per se* violation does not obviate the need to satisfy this test. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The Court today purportedly defines only the contours of antitrust injury that can result from a vertical, nonpredatory, maximum-price-fixing scheme. But much, if not all, of its reasoning about what constitutes injury actionable by a competitor would apply even if the alleged conspiracy had been joined by other major oil companies doing business in California, as well as their retail outlets.[1] The Court undermines the enforceability of a substantive price-fixing violation with a flawed construction of § 4, erroneously assuming that the level of a price fixed by a § 1 conspiracy is relevant to legality and that all vertical arrangements conform to a single model.

I

Because so much of the Court's analysis turns on its characterization of USA's cause of action, it is appropriate to

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[1] For example, the Court reasons:

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *Ante*, at 340.

"When prices are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct." *Ante*, at 340–341.

begin with a more complete description of USA's theory. As the case comes to us on review of summary judgment, we assume the truth of USA's allegation that ARCO conspired with its retail dealers to fix the price of gas at specific ARCO stations that compete directly with USA stations. It is conceded that this price-fixing conspiracy is a *per se* violation of § 1 of the Sherman Act.

USA's theory can be expressed in the following hypothetical example: In a free market ARCO's advertised gas might command a price of $1 per gallon while USA's unadvertised gas might sell for a penny less, with retailers of both brands making an adequate profit. If, however, the ARCO stations reduce their price by a penny or two, they might divert enough business from USA stations to force them gradually to withdraw from the market.[2] The fixed price would be lower than the price that would obtain in a free market, but not so low as to be "predatory" in the sense that a single actor could not lawfully charge it under 15 U. S. C. § 2 or § 13a.[3]

This theory rests on the premise that the resources of the conspirators, combined and coordinated, are sufficient to sustain below-normal profits in selected localities long enough to force USA to shift its capital to markets where it can receive a normal return on its investment.[4] Thus, during the initial

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[2] "31. Arco and its co-conspirators have engaged in limit pricing practices in which prices are deliberately set on gasoline at a level below their competitors' cost with the purpose and effect of making it impossible for plaintiff and other independents to compete. For example, Arco and its co-conspirators have sold gasoline, ex tax, at the retail pump for less than independents, such as plaintiff, can purchase gasoline at wholesale." Amended Complaint, App. 18.

[3] "27. Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels. . . ." Amended Complaint, App. 17.

[4] It may be that ARCO could have accomplished its objectives independently, merely by reducing its own prices sufficiently to induce its retail cus-

period of competitive struggle between the conspirators and the independents, consumers will presumably benefit from artificially low prices. If the alleged campaign is successful, however—and as the case comes to us we must assume it will be—in the long run there will be less competition, or potential competition, from independents such as USA, and the character of the market will be different than if the conspiracy had never taken place. USA alleges that, in fact, the independent market already has suffered significant losses.[5]

II

ARCO's alleged conspiracy is a naked price restraint in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.[6] It is undisputed that ARCO's price-fixing arrangement, as alleged,

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tomers to charge abnormally low prices and divert business from USA stations. See, *e. g.*, Amended Complaint ¶ 30, App. 18. Such independent action by ARCO, followed by independent action by its retail customers, of course would be lawful, even if it produced the same consequences as the alleged conspiratorial program. See *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). Indeed, a full trial might establish that that is what happened. Nevertheless, as the case comes to us, we assume that ARCO is the architect of an illegal conspiracy.

[5] "18. For the last few years, there has been, and still is, a steady and continuous reduction in the competitive effectiveness of independent refiners and marketers selling in California and the western United States. During this time period, more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have been closed. The barriers to entry into this market have been high, and today such barriers are effectively insurmountable; once an independent is eliminated, it is highly unlikely that it will be replaced." Amended Complaint, App. 15.

[6] We have long held under the Sherman Act that "a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222–223 (1940). See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 213 (1951) (maximum resale prices); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984) (vertical resale prices); *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968) (vertical maximum resale prices).

is illegal *per se* under the rule against maximum price fixing, which is "'grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962)." *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 348 (1982). At issue is only whether a maximum price, administered on a host of retail stations that are ostensibly competing with one another as well as with other retailers, may be challenged by the competitor targeted by the pricing scheme.

Section 4 of the Clayton Act allows private enforcement of the antitrust laws by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. See *Simpson* v. *Union Oil Co. of California*, 377 U. S. 13, 16 (1964) (quoting *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957)) (laws allowing private enforcement of the antitrust laws by an aggrieved party "'protect the victims of the forbidden practices as well as the public'"). In order to invoke § 4, a plaintiff must prove that it suffered an injury that (1) is "of the type the antitrust laws were intended to prevent" and (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977). In *Brunswick*, the plaintiff businesses claimed that they were deprived of the benefits of the increased concentration that would have resulted had failing businesses not been acquired by petitioner, allegedly in violation of § 7. In concluding that the plaintiffs had failed to prove "antitrust injury," we found that neither condition of § 4 standing was satisfied: First, the plaintiffs sought to recover damages because the mergers had preserved businesses and competition, which is not the type of injury that the antitrust laws are designed to prevent; and second, the plaintiffs had not been harmed by any potential change in the market structure

effected by the entry of the "'deep pocket' parent." *Id.*, at 487–488.

In this case, however, both conditions of standing are met. First, § 1 is intended to forbid price-fixing conspiracies that are designed to drive competitors out of the market. See *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213 (1959) (illegal coordination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"). USA alleges that ARCO's pricing scheme aims at forcing independent refiners and marketers out of business and has created "an immediate and growing probability that the independent segment of the industry will be destroyed altogether."[7]

In *Brunswick*, we recognized that requiring a competitor to show that its loss is "of the type" antitrust laws were intended to prevent

> "does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actu-

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[7] USA's Amended Complaint specifically alleges:

"39. As a direct and proximate result of the above-described combinations and conspiracy and of the acts taken in furtherance thereof:

"(a) the price of gasoline has been artificially fixed, maintained and stabilized;

"(b) independent refiners and marketers have suffered substantial losses of sales and profits and their ability to compete has been seriously impaired;

"(c) independent refiners and marketers have gone out of business or been taken over by Arco;

"(d) there is an immediate and growing probability that the independent segment of the industry will be destroyed altogether and that control of the discount market will be acquired by Arco." App. 20.

> ally are driven from the market and competition is thereby lessened." 429 U. S., at 489, n. 14.

The pricing behavior in the Court's hypothetical example may cause actionable injury because it is "predatory." This is so because the Court assumes that a predatory price is illegal. The direct relationship between the illegality and the harm is what makes the competitor's short-term loss "antitrust injury." The fact that the illegality in the case before us today stems from the illegal conspiracy, rather than the predatory character of the price, does not change the analysis of "that which makes defendants' acts unlawful."[8] Thus, notwithstanding any temporary benefit to consumers, the unlawful pricing practice that is harmful in the long run to competition causes "antitrust injury" for which a competitor may seek damages.[9]

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[8] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977). The analysis in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986), also supports this conclusion. There, the respondent alleged "antitrust injury" on alternative theories: first, that after the challenged merger petitioners' company would be able to lower its prices because it would be more efficient; and second, that it might attempt to drive respondent out of business by engaging in sustained predatory pricing. We rejected the first theory because *independent* decisions to reduce prices based on efficiencies are legal and precisely what the antitrust laws are intended to encourage. *Id.*, at 116–117. We rejected the second theory because respondent "neither raised nor proved any claim of predatory pricing before the District Court." *Id.*, at 119. However, in discussing the second theory, we recognized that predatory pricing "is a practice that harms both competitors *and* competition," and because it aims at "the elimination of competition. . . . is thus a practice 'inimical to the purposes of [the antitrust] laws,' *Brunswick*, 429 U. S., at 488, and one capable of inflicting antitrust injury." *Id.*, at 117–118 (footnote omitted). Again, a competitor suffers the same "antitrust injury" from an illegal conspiracy setting prices designed to eliminate it as it would suffer from a single firm setting predatory prices.

[9] See also Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1561–1565 (1989) (unsuccessful predatory efforts cause "antitrust injury" even though consumers have not suffered).

Second, USA is directly and immediately harmed by this price-fixing scheme, that is to say, by "that which makes defendants' acts unlawful." *Id.*, at 489. In *Brunswick*, the allegedly illegal conduct at issue—the merger—itself did not harm the plaintiffs; similarly, in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U. S. 104 (1986), the alleged injury arose not from the illegality of the proposed merger, but merely from possible postmerger behavior. Although the link between the illegal *mergers* and the alleged harms was insufficient to prove antitrust injury in either *Brunswick* or *Cargill*, both of those cases recognize that illegal *pricing practices* may cause competitors "antitrust injury."[10]

The Court accepts that, as alleged, the vertical price-fixing scheme by ARCO is *per se* illegal under § 1. Nevertheless, it denies USA standing to challenge the arrangement because it is neither a consumer nor a dealer in the vertical arrangement, but only a competitor of ARCO: The "antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Ante*, at 338 (quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962)). This proposition—which is often used as a test of whether a violation of law occurred—cannot be read to deny all remedial actions by com-

[10] I agree that not *every* loss that is causally related to an antitrust violation is "antitrust injury," *ante*, at 339, n. 8, but a scheme that prices the services of conspirators below those of competitors may cause injury for which the competitor may recover damages under § 4. In *Blue Shield of Virginia* v. *McCready*, 457 U. S. 465 (1982), the presumed injury to competitors was strong enough to support even an indirect action by a patient of the competitor. Petitioners, a medical insurance company and an organization of psychiatrists, conspired in violation of § 1 to compensate patients for the services of psychiatrists, but not those of psychologists. We recognized that if patients had chosen to go to psychiatrists, the "antitrust injury would have been borne in the first instance by the [psychologist] competitors of the conspirators." *Id.*, at 483. Instead, patient McCready went to a psychologist at her own expense. We held that "[a]lthough McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologists and the psychotherapy market." *Id.*, at 483–484.

petitors. When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of protecting competition. The Court nevertheless interprets the proposition as categorically excluding actions by a competitor who suffers when others charge "nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme." *Ante*, at 331. In the context of a § 1 violation, however, the distinctions both of the price level and of the vertical nature of the conspiracy are unfounded. Each of these two analytical errors merits discussion.

III

The Court limits its holding to cases in which the noncompetitive price is not "predatory," *ante*, at 331, 333, n. 3, 335, 339, 340, essentially assuming that any nonpredatory price set by an illegal conspiracy is lawful, see n. 1, *supra*. This is quite wrong. Unlike the prohibitions against monopolizing or underselling in violation of § 2 or § 13a, the gravamen of the price-fixing conspiracy condemned by § 1 is unrelated to the level of the administered price at any particular point in time. A price fixed by a single seller acting independently may be unlawful because it is predatory, but the reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal.

If any proposition is firmly settled in the law of antitrust, it is the rule that the reasonableness of the particular price agreed upon by defendants does not constitute a defense to a price-fixing charge.[11] In *United States* v. *Trenton Potteries*

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[11] See *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 398 (1927); see also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 291 (CA6 1898) ("[T]he association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from

Co., 273 U. S. 392 (1927), the Court explained that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow," *id.*, at 397, and cautioned that

> "in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *Id.*, at 398.

See also *United States* v. *Masonite Corp.*, 316 U. S. 265, 281–282 (1942). This reasoning applies with equal force to a rule that provides conspirators with a defense if their agreed upon prices are nonpredatory, but no defense if their prices fall below the elusive line that defines predatory pricing.[12] By assuming that the level of a price is relevant to the inquiry in a § 1 conspiracy case, the Court sets sail on the "sea of doubt" that Judge Taft condemned in his classic opinion in the *Addyston Pipe & Steel* case:

> "It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of

committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly").

[12] Like the determination of a "reasonable" price, determination of what is a "predatory price" is far from certain. The Court declines to define predatory pricing for the purpose of the § 4 inquiry it creates today, *ante*, at 341, n. 10. Predatory pricing by a conspiracy, rather than a single actor, may result from more than pricing below an appropriate measure of cost. See *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 585, n. 8 (1986). See also *A. A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F. 2d 1396, 1400 (CA7 1989) (describing the many considerations in a single firm case that make it difficult to infer predatory conduct from the relation of price to cost).

doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283–284 (CA6 1898).

IV

The Court is also careful to limit its holding to cases involving "vertical" price-fixing agreements. In a thinly veiled circumscription of the substantive reach of § 1, the Court simply interprets "antitrust injury" under § 4 so that it excludes challenges by any competitor alleging a vertical conspiracy: "[A] vertical price-fixing scheme may facilitate predatory pricing . . . [b]ut because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement." *Ante*, at 339, n. 9.[13] This focus on the vertical character of the agreement is misleading because it incorrectly assumes that there is a sharp distinction between vertical and horizontal arrangements, and because it assumes that all vertical arrangements affect competition in the same way.

The characterization of ARCO's price-fixing arrangement as "vertical" does not limit its potential consequences to a neat category of injuries. A horizontal conspiracy among ARCO retailers administered by, for example, trade association executives instead of executives of their common supplier would generate exactly the same anticompetitive consequences. ARCO and its retail dealers all share an interest in excluding independents like USA from the market. The fact

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[13] Thus, a victim of a vertical maximum-price-fixing conspiracy that is successfully driving it from the market cannot bring an action under § 1 as long as the conspirators take care to fix their prices at "nonpredatory" levels.

that each member of a group of price fixers may have made a separate, individual agreement with their common agent does not destroy the horizontal character of the agreement. We so held in the *Masonite* case:

> "[T]here can be no doubt that this is a price-fixing combination which is illegal *per se* under the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 [(1927)]; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 [(1940)]; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 [(1940)]. That is true though the District Court found that, in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others. . . . Prices are fixed when they are agreed upon. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. *Id.*"[14]

Differences between vertical and horizontal agreements may support an argument that the former are more reasonable, and therefore more likely to be upheld as lawful, than the latter. But such differences provide no support for the Court's contradictory reasoning that the direct and intended consequences of one form of conspiracy do *not* constitute "antitrust injury," while precisely the same consequences of the other form *do*.

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[14] *United States* v. *Masonite Corp.*, 316 U. S. 265, 274–276 (1942). See also *ante*, at 336, n. 6 (suggesting a horizontal component of the maximum-price-fixing arrangement in *Kiefer-Stewart*); *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 744–748 (1988) (STEVENS, J., dissenting).

Finally, the Court's treatment of vertical maximum-price-fixing arrangements necessarily assumes that all such conspiracies have the same competitive consequences. *Ante*, at 337, 339–340, 345. The Court is again quite wrong.[15] For example, a price agreement that is ancillary to an exclusive distributorship might protect consumers from an attempt by the distributor to exploit its limited monopoly. However, a conclusion that such an agreement would not cause any antitrust injury lends no support to the Court's holding that an illegal price arrangement designed to drive a competitor out of business is immune from challenge by its intended victim.[16]

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[15] Indeed, the Court elsewhere acknowledges that "'[m]aximum and minimum price fixing may have different consequences in many situations.'" *Ante*, at 343, n. 13 (quoting *Albrecht*, 390 U. S., at 152). This is quite true. See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 348 (1982) (the *per se* rule against maximum prices guards against the elimination of competition, discouraging entry into the market, deterring experimentation, and allowing hidden price setting); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51, n. 18 (1977) (vertical price fixing reduces interbrand and intrabrand competition and may facilitate cartelizing). In *Sylvania*, the Court also recognized that "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States." *Ibid.* See also *White Motor Co.* v. *United States*, 372 U. S. 253, 268 (1963) (BRENNAN, J., concurring) ("Resale price maintenence is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands").

[16] The Court grudgingly "assume[s], *arguendo*, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule," *ante*, at 335, n. 5, but seeks to limit that holding to "potential effects on dealers and consumers, not . . . *competitors*," *ante*, at 336. However, in its zeal to narrow antitrust injury, the Court assumes that all vertical maximum-price-fixing arrangements mimic the circumstances present or discussed in *Albrecht*, in which there was monopoly power at both the production and exclusive distributorship stages. This approach is incorrect. For example, in *Albrecht* itself the Court identified possible injury to consumers as one basis for its *per se* rule, even though there was no evidence of actual consumer injury in that case. 390 U. S., at 152–153. Furthermore, the

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In a conspiracy case we should always ask ourselves why the defendants have elected to act in concert rather than independently.[17] Although in certain situations collective action may actually foster competition, see, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U. S. 85 (1984), we normally presume that the free market functions most effectively when individual entrepreneurs act independently. This is true with respect to both maximum and minimum pricing arrangements.

Professor Sullivan recognized that producers fixing maximum prices "are not acting from undiluted altruism," but

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Albrecht Court did not treat Albrecht himself as a "dealer" in the conspiracy, but essentially as a "competitor" targeted by the price-fixing conspiracy between Herald Company and the new dealers that were hired "to force petitioner to conform to the advertised retail price" by selling newspapers in his territory at lower, fixed prices. *Id.*, at 149–150, and n. 6. Although Albrecht was a *potential* Herald dealer—and thus not strictly a "dealer" or a "competitor" in the Court's use of those terms—what is critical is that he had standing to bring a § 1 action as the victim of a vertical conspiracy to underprice his sales. Finally, the Court contradicts its own contrived model when it admits that vertical maximum-price-fixing schemes may facilitate predatory pricing for which a competitor could suffer "antitrust injury" in violation of § 2. *Ante*, at 339, n. 9.

[17] Until today, the Court has clearly understood why § 1 fundamentally differs from other antitrust violations:

"The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768–769 (1984).

from self-interested goals such as prevention of new entries into the market. L. Sullivan, Law of Antitrust 211 (1977). He described the broad policy reasons to prohibit collusive pricing:

> "The policy which insists on individual decisions about price thus has at its source more than a preference for the independence of the small businessman (though that is surely there) and more than a preference for the lower prices which such a policy will usually yield to consumers (though that too is strongly present). Also at work is the theoretical conviction that the most general function of the competitive process, the allocation and reallocation of resources in a rational yet automatic manner, can be carried out only if independence by each trader is scrupulously required. Created out of the confluence of these parallel strivings, the policy has a breadth which makes it as forbidding to maximum price arrangements as to the more common ones which forestall price decreases." *Id.*, at 212.

In carving out this exception to the enforcement of § 1, the Court has chosen to second-guess the wisdom of our *per se* rules and to embark on the questionable enterprise of parsing illegal conspiracies. This approach fails to heed the prudence urged in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972):

> "The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.
>
> "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase compe-

tition. *E. g.*, *United States* v. *General Motors Corp.*, 384 U. S. 127, 146–147 (1966); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457 (1941)." *Id.*, at 609–610.

The Court, in its haste to excuse illegal behavior in the name of efficiency,[18] has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare,[19] and that private actions not only compensate the injured, but also deter wrongdoers.[20]

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[18] See, *e. g.*, *ante*, at 337–338, n. 7 ("Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient"); *ante*, at 344 ("[I]nsofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored"). Firms may properly go out of business because they are inefficient; market inefficiencies may also create imperfections leading to some firms' demise. The Court sanctions a new force—the super-efficiency of an illegally combined group of firms who target their resources to drive an otherwise competitive firm out of business. Cf. Note, Below-Cost Sales and the Buying of Market Share, 42 Stan. L. Rev. 695, 741 (1990) (discussing long-term displacement of "otherwise efficient producers" by pricing to buy out a market share in a geographic area).

[19] Chief Justice Hughes regarded the Sherman Act as a "charter of freedom," *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359 (1933). Judge Learned Hand recognized Congress' desire to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them," *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 428–429 (CA2 1945), and we recently reaffirmed that the Sherman Act is "the Magna Carta of free enterprise," *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). See also, *e. g.*, Handler, Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in its National Policy? 10 Cardozo L. Rev. 1933 (1989); Hovenkamp, Distributive Justice and the Antitrust Laws, 51 Geo. Wash. L. Rev. 1 (1982); Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, 62 N. Y. U. L. Rev. 1125, 1137–1141 (1987) (discussing the political, social, and moral—as well as economic—goals motivating Congress in enacting antitrust legislation).

[20] See, *e. g.*, *Simpson* v. *Union Oil Co. of California*, 377 U. S. 13 (1964); see also Polden, Antitrust Standing and the Rule Against Resale Price

As we explained in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 183 (1911): "[I]t was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act." The conspiracy alleged in this complaint poses the kind of threat to individual liberty and the free market that the Sherman Act was enacted to prevent. In holding such a conspiracy immune from challenge by its intended victim, the Court is unfaithful to its history of respect for this "charter of freedom."[21]

I respectfully dissent.

Maintenance, 37 Clev. St. L. Rev. 179, 208–209, 220–221 (1989) (§ 4 furthers congressional objectives of deterrence and compensation by allowing private suits by injured competitors); Blair & Harrison, 42 Vand. L. Rev., at 1564–1565 (treating losses of firms that are targeted by unsuccessful predatory efforts as "antitrust injury" furthers private enforcement of antitrust laws and avoids "suboptimal levels of deterrence").

The Court of Appeals below observed that barring competitor standing leaves enforcement of the "vast majority of unlawful maximum resale price agreements" in the hands of "an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement." 859 F. 2d 687, 694, n. 5 (CA9 1988).

[21] *Appalachian Coals, Inc.*, 288 U. S., at 359.

UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR RAWSON, ET AL.

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 89–322. Argued March 26, 1990—Decided May 14, 1990

Respondents, deceased miners' survivors, filed a state-law wrongful-death action in Idaho state court against petitioner United Steelworkers of America (Union), the miners' exclusive bargaining agent, alleging that the miners' deaths in an underground fire were proximately caused by the Union's fraudulent and negligent acts in connection with mine safety inspections conducted by its representatives pursuant to the collective-bargaining agreement with the mine's operator. On remand from a State Supreme Court decision that the claims were not pre-empted by federal labor law, the trial court granted summary judgment for the Union. It found that the record was devoid of evidence supporting the fraud claim and urged the State Supreme Court to reconsider its decision that the negligence claim was not pre-empted. The State Supreme Court upheld the trial court's summary judgment on the fraud claim, but again concluded that respondents' negligence claim was not pre-empted. Distinguishing this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202—which held that a state-law tort action against an employer may be pre-empted by § 301 of the Labor Management Relations Act, 1947, if the duty to the employee that was violated by the tort is created by a collective-bargaining agreement and without existence independent of the agreement—the court found that the instant agreement's provisions did "not require interpretation, . . . but rather . . . determine[d] only the nature and scope of the Union's duty." This Court vacated the State Supreme Court's judgment and remanded the case for further consideration in light of *Electrical Workers* v. *Hechler*, 481 U. S. 851, which extended *Allis-Chalmers* to a tort suit by an employee against her union. On remand, the State Supreme Court distinguished *Hechler* on the ground that, there, the alleged duty of care arose from the collective-bargaining agreement, whereas, here, the Union's duty to perform the inspection reasonably arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in the inspection was contained in the labor contract. Since it was conceded that the Union undertook to inspect, the court noted, the sole issue was whether that inspection was negligent under state tort law.

Held:

1. Respondents' tort claim is pre-empted by § 301. The claim cannot be described as independent of the collective-bargaining agreement, since the Union's representatives were participating in the inspection process pursuant to that agreement's provisions. Thus, if the Union failed to perform a duty in connection with the inspection, it was a duty arising out of the agreement signed by the Union as the miners' bargaining agent, not a duty of reasonable care owed to every person in society. Pre-emption by federal law cannot be avoided by characterizing the Union's negligence as a state-law tort. Pp. 368–372.

2. Respondents may not maintain a § 301 suit against the Union. Pp. 372–376.

(a) Mere negligence, even in the enforcement of a collective-bargaining agreement, does not state a claim for breach of the duty of fair representation, which is a purposely limited check on the arbitrary exercise of union power. While a union may assume a responsibility toward employees by accepting a duty of care through a collective-bargaining agreement, *Hechler*, *supra*, at 860, if an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees. Nothing in the agreement at issue suggests that it creates such obligations, since the pertinent part of the agreement consists of agreements between the Union and the employer and is enforceable only by them. Pp. 372–375.

(b) Moreover, under traditional principles of contract interpretation, respondents have no claim, for, as third-party beneficiaries, they have no greater rights in the agreement than does the promisee, the employer. Here, the employer has no enforceable right as promisee. The agreement provisions respondents rely on are not promises made by the Union to the employer. Rather, the limited surrender of the employer's exclusive authority over mine safety is a concession made by the employer to the Union. P. 375.

(c) Although respondents' claim that the Union had committed fraud on the membership in violation of state law might implicate the duty of fair representation, respondents did not cross-petition for review of the State Supreme Court's holding that summary judgment was properly entered on this claim. P. 376.

115 Idaho 785, 770 P. 2d 794, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. KENNEDY, J.,

filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 376.

George H. Cohen argued the cause for petitioner. With him on the briefs were *Robert M. Weinberg*, *Julia P. Clark*, *Laurence Gold*, *Bernard Kleiman*, *Carl Frankel*, *Paul D. Carey*, and *James D. Nelson*.

Kenneth B. Howard argued the cause for respondents. With him on the brief were *Kerwin C. Bennett* and *Lloyd J. Webb*.*

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case because the decisions of the Supreme Court of Idaho, holding that petitioner may be liable under state law for the negligent inspection of a mine where respondents' decedents worked, raised important questions about the operation of federal and state law in defining the duties of a labor union acting as a collective-bargaining agent.

I

This dispute arises out of an underground fire that occurred on May 2, 1972, at the Sunshine Mine in Kellogg, Idaho, and caused the deaths of 91 miners. Respondents, the survivors of four of the deceased miners, filed this state-law wrongful-death action in Idaho state court. Their complaint alleged that the miners' deaths were proximately caused by fraudulent and negligent acts of petitioner United Steelworkers of America (Union), the exclusive bargaining representative of the miners working at the Sunshine Mine. As to the negligence claim, the complaint specifically alleged that the Union "undertook to act as accident prevention representative and enforcer of an agreement negotiated between *[sic]* [the Union] on behalf of the deceased miners," App. 53–54, and "undertook to provide representatives who in-

*Briefs of *amici curiae* urging reversal were filed for Continental Beverage Packaging, Inc., by *Robert A. Christensen* and *Stanley S. Jaspan*; and for Public Citizen by *Paul Alan Levy* and *Alan B. Morrison*.

spected [the Sunshine Mine] and pretended to enforce the contractual accident prevention clauses," *id.*, at 54. Respondents' answers to interrogatories subsequently made clear that their suit was based on contentions that the Union had, through a collective-bargaining agreement negotiated with the operator of the Sunshine Mine, caused to be established a joint management-labor safety committee intended to exert influence on management on mine safety measures; that members of the safety committee designated by the Union had been inadequately trained on mine safety issues; and that the Union, through its representatives on the safety committee, had negligently performed inspections of the mine that it had promised to conduct, failing to uncover obvious and discoverable deficiencies. *Id.*, at 82–83.

The trial court granted summary judgment for the Union, accepting the Union's argument that "federal law has preempted the field of union representation and its obligation to its membership," App. to Pet. for Cert. 164a, and that "[n]egligent performance of [a union's] contractual duties does not state a claim under federal law for breach of fair representation," *id.*, at 163a. The Supreme Court of Idaho reversed. *Dunbar* v. *United Steelworkers of America*, 100 Idaho 523, 602 P. 2d 21 (1979). In the view of the Supreme Court of Idaho, although federal law unquestionably imposed on the Union a duty of fair representation of the miners, respondents' claims were "not necessarily based on the violation of the duty of fair representation and such is not the only duty owed by a union to its members." *Id.*, at 526, 602 P. 2d, at 24. Three of the five justices concurred specially to emphasize that "the precise nature of the legal issues raised by [respondents'] wrongful death action is not entirely clear at the present procedural posture of the case," and that "a final decision whether the wrongful death action . . . is preempted . . . must therefore await a full factual development." *Id.*, at 547, 602 P. 2d, at 25 (Bakes, J., specially concurring).

We denied the Union's petition for certiorari. *Steelworkers* v. *Dunbar*, 446 U. S. 983 (1980).

After extensive discovery, the trial court again granted summary judgment for the Union. App. to Pet. for Cert. 89a–106a. As to respondents' fraud claim, the court concluded that the record was devoid of evidence supporting the contentions that the Union had made misrepresentations of fact, that the Union had intended to defraud the miners, or that the miners had relied on Union representations. *Id.*, at 96a. On the negligence count, the trial court first noted that, in its view, respondents' claims centered on the collective-bargaining contract between the Union and the Sunshine Mine, especially Article IX of the agreement, which established the joint management-labor safety committee. *Id.*, at 90a–91a. The trial court urged the State Supreme Court to reconsider its conclusion that respondents' state-law negligence claim was not pre-empted by federal labor law, reasoning that "[respondents] are complaining about the manner in which the Union carried out the collective bargaining agreement, essentially saying the Union advisory committee should have done more," and that respondents "are attempting to hold the [Union] liable on the basis of its representational duties." *Id.*, at 103a–104a.

The Supreme Court of Idaho originally affirmed the grant of summary judgment on appeal. *Id.*, at 49a–88a. On rehearing, however, the Idaho Supreme Court withdrew its prior opinion and concluded that respondents had stated a valid claim under Idaho law that was not pre-empted by federal labor law. *Rawson* v. *United Steelworkers of America*, 111 Idaho 630, 726 P. 2d 742 (1986). Distinguishing this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), which held that resolution of a state-law tort claim must be treated as a claim arising under federal labor law when it is substantially dependent on construction of the terms of a collective-bargaining agreement, the Supreme Court of Idaho stated that "in the instant case, the provisions

of the collective bargaining agreement do not require interpretation, . . . but rather the provisions determine only the nature and scope of the Union's duty." 111 Idaho, at 640, 726 P. 2d, at 752. The court continued: "Our narrow holding today is that the Union, having inspected, assumed a duty to use due care in inspecting and, from the duty to use due care in inspecting arose the further duty to advise the committee of any safety problems the inspection revealed." *Ibid.* The court also affirmed the trial court's conclusion that summary judgment for the Union was proper on respondents' fraud claim. *Id.*, at 633, 726 P. 2d, at 745.

The Union again petitioned for certiorari. While that petition was pending, we decided *Electrical Workers* v. *Hechler*, 481 U. S. 851 (1987), in which it was held that an individual employee's state-law tort suit against her union for breach of the union's duty of care to provide the employee with a safe workplace must be treated as a claim under federal labor law, when the duty of care allegedly arose from the collective-bargaining agreement between the union and the employer. Six days later, we granted the Union's petition, vacated the judgment of the Supreme Court of Idaho, and remanded this case for further consideration in light of *Hechler*. *Steelworkers* v. *Rawson*, 482 U. S. 901 (1987).

On remand, the Supreme Court of Idaho "adhere[d] to [its] opinion as written." 115 Idaho 785, 788, 770 P. 2d 794, 797 (1988). The court also distinguished *Hechler*, stressing that there we had considered a situation where the alleged duty of care arose from the collective-bargaining agreement, whereas in this case "the activity was concededly undertaken and the standard of care is imposed by state law without reference to the collective bargaining agreement." 115 Idaho, at 786, 770 P. 2d, at 795. The court further stated that it was "not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded that the union undertook to inspect and, thus, the issue is solely whether that

inspection was negligently performed under traditional Idaho tort law." *Id.*, at 787, 770 P. 2d, at 796.

We granted certiorari, 493 U. S. 1017 (1990), and we now reverse.

II

Section 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Over 30 years ago, this Court held that § 301 not only provides the federal courts with jurisdiction over controversies involving collective-bargaining agreements but also authorizes the courts to fashion "a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 451 (1957). Since then, the Court has made clear that § 301 is a potent source of federal labor law, for though state courts have concurrent jurisdiction over controversies involving collective-bargaining agreements, *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), state courts must apply federal law in deciding those claims, *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), and indeed any state-law cause of action for violation of collective-bargaining agreements is entirely displaced by federal law under § 301, see *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968). State law is thus "preempted" by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements.

In recent cases, we have recognized that the pre-emptive force of § 301 extends beyond state-law contract actions. In *Allis-Chalmers Corp.* v. *Lueck*, *supra*, we held that a state-law tort action against an employer may be pre-empted by § 301 if the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement. Any other result, we reasoned, would "allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Id.*, at 211. We extended this rule of pre-emption to a tort suit by an employee against her union in *Electrical Workers* v. *Hechler*, *supra*. There Hechler alleged that her union had by virtue of its collective-bargaining agreement with the employer and its relationship with her assumed the duty to ensure that she was provided with a safe workplace, and that the union had violated this duty. As in *Allis-Chalmers*, the duty relied on by Hechler was one without existence independent of the collective-bargaining agreement (unions not, under the common law of Florida, being charged with a duty to exercise reasonable care in providing a safe workplace, see 481 U. S., at 859–860), but was allegedly created by the collective-bargaining agreement, of which Hechler claimed to be a third-party beneficiary, see *id.*, at 861. Because resolution of the tort claim would require a court to "ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union . . . , and second, the nature and scope of that duty," *id.*, at 862, we held that the tort claim was not sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301.

At first glance it would not appear difficult to apply these principles to the instant case. Respondents alleged in their complaint that the Union was negligent in its role as "enforcer of an agreement negotiated between *[sic]* [the Union] on behalf of the deceased miners," App. 53–54, a plain refer-

ence to the collective-bargaining agreement with the operator of the Sunshine Mine. Respondents' answers to interrogatories gave substance to this allegation by stating that "by the contract language" of the collective-bargaining agreement, the Union had caused the establishment of the joint safety committee with purported influence on mine safety issues, and that members of the safety committee had failed reasonably to perform inspections of the mine or to uncover obvious and discoverable deficiencies in the mine safety program. App. 82–83. The only possible interpretation of these pleadings, we believe, is that the duty on which respondents relied as the basis of their tort suit was one allegedly assumed by the Union in the collective-bargaining agreement. Prior to our remand, the Supreme Court of Idaho evidently was of this view as well. The court noted then that the Union could be liable under state tort law because it allegedly had contracted to inspect, and had in fact inspected, the mine "pursuant to the provisions of the collective bargaining agreement." 111 Idaho, at 638, 726 P. 2d, at 750. Although the Idaho Supreme Court believed that resolution of the tort claim would not require interpretation of the terms of the collective-bargaining agreement, it acknowledged that the provisions of that agreement determined "the nature and scope of the Union's duty," *id.*, at 640, 726 P. 2d, at 752.

The situation is complicated, however, by the Idaho Supreme Court's opinion after our remand. Although the court stated that it adhered to its prior opinion as written, 115 Idaho, at 788, 770 P. 2d, at 797, it also rejected the suggestion that there was any need to look to the collective-bargaining agreement to discern whether it placed any implied duty on the Union. Rather, Idaho law placed a duty of care on the Union because the Union did, in fact, actively inspect the mine, and the Union could be held liable for the negligent performance of that inspection. *Id.*, at 787, 770 P. 2d, at 796. According to the Supreme Court of Idaho, the

Union may be liable under state tort law because its duty to perform that inspection reasonably arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract.

As we see it, however, respondents' tort claim cannot be described as independent of the collective-bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society. There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could forseeably cause injury to any person who might possibly be in the vicinity.

Nor do we understand the Supreme Court of Idaho to have held that any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities. Indeed, the court did not disavow its previous opinion, where it acknowledged that the Union's representatives were participating in the inspection process pursuant to the provisions of the collective-bargaining agreement, and that the agreement determined the nature and scope of the Union's duty. If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law. "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S., at 211. Pre-emption by federal law cannot be

avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort. Accordingly, this suit, if it is to go forward at all, must proceed as a case controlled by federal, rather than state, law.

III

The Union insists that the case against it may not go forward even under federal law. It argues first that only the duty of fair representation governs the exercise of its representational functions under the collective-bargaining contract, and that a member may not sue it under § 301 for breach of contract. Second, the Union submits that even if it may be sued under § 301, the labor agreement contains no enforceable promise made by it to the members of the unit in connection with inspecting the mine. Third, the Union asserts that as the case now stands, it is charged with only negligence, which is insufficient to prove a breach of its duty of fair representation.

"It is now well established that, as the exclusive bargaining representative of the employees, . . . the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement." *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ibid.* This duty of fair representation is of major importance, but a breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.*, at 190. The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would

not state a claim for breach of the duty of fair representation, and we endorse that view today.

The Union's duty of fair representation arises from the National Labor Relations Act itself. See *Breininger* v. *Sheet Metal Workers*, 493 U. S. 67, 86–87 (1989); *DelCostello* v. *Teamsters*, 462 U. S. 151, 164 (1983); *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 66 (1981) (Stewart, J., concurring in judgment). The duty of fair representation is thus a matter of status rather than contract. We have never held, however, that, as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to the employees by contract. Although at one time it may have appeared most unlikely that unions would be called upon to assume such duties, see *Humphrey* v. *Moore*, 375 U. S. 335, 356–357 (1964) (Goldberg, J., concurring in result), nonetheless "it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process," *id.*, at 358, and it may well be that if unions begin to assume duties traditionally viewed as the prerogatives of management, cf. *Breininger*, *supra*, at 87–88; *Electrical Workers* v. *Hechler*, 481 U. S., at 859–860, employees will begin to demand that unions be held more strictly to account in their carrying out of those duties. Nor do we know what the source of law would be for such a prohibition, for "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 576 (1982); cf. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 106–108 (1970).

Our decision in *Electrical Workers* v. *Hechler*, *supra*, is relevant here. There we were presented with a claim by an employee that the union had breached its duty to provide her with a safe workplace. The alleged duty was plainly based on the collective-bargaining agreement that the union

had negotiated with the employer; Hechler argued that she was a third-party beneficiary of that agreement. *Id.*, at 861, 864–865. Hechler carefully distinguished her § 301 claim from a fair representation claim, *id.*, at 864, and so did we, for the distinction had a significant effect: The statutes of limitations for the two claims are different. *Id.*, at 863–865. We therefore accepted, and again accept, that "a labor union . . . may assume a responsibility towards employees by accepting a duty of care through a contractual agreement," *id.*, at 860, even if that contractual agreement is a collective-bargaining contract to which only the union and the employer are signatories.

But having said as much, we also think it necessary to emphasize caution, lest the courts be precipitate in their efforts to find unions contractually bound to employees by collective-bargaining agreements. The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953). If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees. Cf. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 653 (1965).

Applying this principle to the case at hand, we are quite sure that respondents may not maintain a § 301 suit against the Union. Nothing in the collective-bargaining agreement suggests that it creates rights directly enforceable by the individual employees against the Union. The pertinent part of the collective-bargaining agreement, Article IX, consists entirely of agreements between the Union and the employer and enforceable only by them. App. 20–22. Section 2 of the Article provides that "a committee consisting of two (2) su-

pervisory personnel and two (2) reliable employees, approved by the Union, shall inspect" the mine if an employee complains to the shift boss that he is being forced to work in unusually unsafe conditions but receives no redress, *id.*, at 20, but even if this section might be interpreted as obliging the Union to inspect the mine in such circumstances, the promise is not one specifically made to, or enforceable by, individual employees. Nor have respondents placed anything in the record indicating that any such complaints were made or that the Union failed to act on them. Section 4 of the Article states that a Union member may accompany the state mine safety inspection team on its inspections of the mine, and Section 5 states that a Union designate and the Safety Engineer "shall make a tour of a section of the mine" once each month, *id.*, at 22, but again the agreement gives no indication that these obligations, if such is what they are, may be enforced by an individual employee.

Moreover, under traditional principles of contract interpretation, respondents have no claim, for with exceptions under federal labor law not relevant here, see *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 468–471 (1960), third-party beneficiaries generally have no greater rights in a contract than does the promisee. For respondents to have an enforceable right as third-party beneficiaries against the Union, at the very least the employer must have an enforceable right as promisee. But the provisions in the collective-bargaining agreement relied on by respondents are not promises by the Union to the employer. Cf. *Teamsters* v. *Lucas Flour Co.*, 369 U. S., at 104–106. They are, rather, concessions made by the employer to the Union, a limited surrender of the employer's exclusive authority over mine safety. A violation by the employer of the provisions allowing inspection of the mine by Union delegates might form the basis of a § 301 suit against the employer, but we are not presented with such a case.

IV

In performing its functions under the collective-bargaining agreement, the Union did, as it concedes, owe the miners a duty of fair representation, but we have already noted that respondents' allegation of mere negligence will not state a claim for violation of that duty. *Supra*, at 372–373. Indeed, respondents have never specifically relied on the federal duty of fair representation, nor have they alleged that the Union improperly discriminated among its members or acted in arbitrary and capricious fashion in failing to exercise its duties under the collective-bargaining agreement. Cf. *Vaca* v. *Sipes*, 386 U. S., at 177. Respondents did, of course, allege that the Union had committed fraud on the membership in violation of state law, a claim that might implicate the duty of fair representation. The Supreme Court of Idaho held, however, that summary judgment was properly entered on this claim because respondents had failed to demonstrate specific facts showing the existence of a genuine issue for trial. 111 Idaho, at 633, 726 P. 2d, at 745. Respondents did not cross-petition to challenge this aspect of the Idaho Supreme Court's judgment, and we are in no position to question it.

It follows that the judgment of the Supreme Court of Idaho must be

Reversed.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Idaho Supreme Court held that summary judgment was improper and that Tharon Rawson and the other respondents could proceed to trial against the United Steelworkers of America (Union) on a state-law tort theory. Although the respondents have not yet established liability under Idaho law, the Union argues that federal law must govern and bar their suit. To support this position, the Union relies on both § 301 of the Labor Management Relations Act, 29 U. S. C. § 185(a), and the duty of fair represen-

tation implicit in § 9(a) of the National Labor Relations Act (NLRA), 49 Stat. 453, as amended, 29 U. S. C. § 159(a). The Court accepts the Union's contentions with respect to § 301 and does not reach the issue of pre-emption by the duty of fair representation. With all respect, I dissent. Neither of the Union's arguments for displacing Idaho law without any trial on the merits has validity.

I

The Union bases its § 301 argument on our decisions in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399, 405–406 (1988); *Electrical Workers* v. *Hechler*, 481 U. S. 851, 854 (1987); and *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 211 (1985). These cases hold that § 301 pre-empts state-law causes of action that require interpretation of a collective-bargaining agreement. In my view, they have no application here. The Idaho Supreme Court, whose determination of state law supersedes that of the trial court, has declared that the respondents' case rests on allegations of the Union's active negligence in a voluntary undertaking, not its contractual obligations.

Adopting verbatim a standard from the Restatement (Second) of Torts § 323 (1965), the Idaho Court expressed the law governing the respondents' claims as follows:

> "'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> "'(a) his failure to exercise such care increases the risk of harm, [or]
>
> "'(b) the harm is suffered because of the other's reliance upon the undertaking.'" *Rawson* v. *United Steelworkers of America*, 111 Idaho 630, 637, 726 P. 2d 742, 749 (1986).

According to the Idaho Supreme Court's second opinion, the respondents can prove the elements of the tort described in § 323 without relying on the Union's collective-bargaining agreement. The Court states:

> "In the instant case, we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law." 115 Idaho 785, 787, 770 P. 2d 794, 796 (1989).

Placing this analysis of state law in the context of our precedents, the Idaho court explains:

> "[T]he instant case is clearly distinguishable from *Hechler* in that here the state tort basis of the action was not abandoned, but has been pursued consistently both at the trial and appellate levels and the tort exists without reference to the collective bargaining agreement." *Id.*, at 787–788, 770 P. 2d, at 796–797.

The court states further:

> "[As in *Lingle* v. *Norge Division of Magic Chef, Inc.*, *supra*], no interpretation of the collective-bargaining agreement is required to determine whether the union member of the inspection team committed a tort when he committed various acts and omissions such as failure to note the self-rescuers were stored in boxes with padlocks or that the activating valves of the oxygen-breathing-apparatuses were corroded shut. Rather, such alleged acts of negligence are measured by state tort law." *Id.*, at 788, 770 P. 2d, at 797.

These statements reveal that the Idaho Supreme Court understood the federal pre-emption standards and interpreted state law not to implicate them. Because we have no basis for disputing the construction of state law by a state supreme court, see *Clemons* v. *Mississippi*, 494 U. S. 738, 747

(1990), I submit that, at this stage of the proceedings, we must conclude that § 301 does not govern the respondents' claims.

The Court reaches a different conclusion because it doubts that the Idaho Supreme Court means what it seems to have said. The Court bases its view, to a large extent, on the Idaho court's expressed intention to "adhere to [its first] opinion as written." 115 Idaho, at 788, 770 P. 2d, at 797. The first opinion says: "Because the union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and *in fact, inspected* the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection." 111 Idaho, at 638, 726 P. 2d, at 750. The Court construes the remark to negate the unequivocal statements quoted above. I cannot accept this labored interpretation.

The Idaho Supreme Court's adherence to the first opinion does not implicate § 301 because it does not require interpretation of a collective-bargaining agreement. The first opinion suggests that the respondents may refer to the collective-bargaining agreement. It does not eliminate the possibility, identified three times in the second opinion, that the respondents may prove the elements of § 323 without relying on the collective-bargaining agreement. Even the Union concedes:

> "After *Hechler*, as we understand matters, both plaintiffs and the Idaho court would locate the source of the union's duty to inspect [in a non-negligent manner] in the union's action of accompanying company and state inspectors on inspections of the mine, and not in any contractual agreement by the union to inspect." Brief for Petitioner 27–28.

The Court, thus, reads too much into the last sentence of the Idaho Supreme Court's second opinion.

I see no reason not to allow this case to go forward with a simple mandate: The respondents may press their state claims so long as they do not rest upon the collective-bargaining

agreement. To the extent that any misunderstanding might exist, this approach would preserve all federal interests. If the Idaho Supreme Court, after a trial on the merits, were to uphold a verdict resting on the Union's obligations under the collective-bargaining agreement, we could reverse its decision. But for now we must take the case as the Idaho Supreme Court has given it to us. According to the second opinion, the respondents may prove the elements of § 323 without relying on the Union's contractual duties.

The Court also rules against the respondents because it surmises that § 323 has no general applicability. The Court assumes that only union members could recover from the Union for its negligence in inspecting the mine and that union members could not recover from anyone else for comparable negligence. See *ante*, at 370–371. I agree that a State cannot circumvent our decisions in *Lingle*, *Hechler*, and *Allis-Chalmers*, by the mere "relabeling" as a tort claim an action that in law is based upon the collective-bargaining process. *Allis-Chalmers*, 471 U. S., at 211. We must have the ultimate responsibility for deciding whether a state law depends on a collective-bargaining agreement for the purposes of § 301. In this case, however, I see no indication that the tort theory pressed by the respondents has the limited application presumed by the Court.

The Idaho Supreme Court did not invent, for the purposes of this case, the theory underlying the respondents' claims. As Cardozo put it: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer* v. *Shepard*, 233 N. Y. 236, 239, 135 N. E. 275, 276 (1922). Restatement § 323, upon which the Idaho Court relies, embodies this principle and long has guided the interpretation of Idaho tort law. See, *e. g.*, *Steiner Corp.* v. *American District Telegraph*, 106 Idaho 787, 791, 683 P. 2d 435, 439 (1984) (fire alarm failure); *S. H. Kress & Co.* v. *Godman*, 95 Idaho 614, 616, 515 P. 2d 561, 563 (1973) (boiler explosion);

Fagundes v. *State*, 116 Idaho 173, 176, 774 P. 2d 343, 346 (App. 1989) (helicopter crash); *Carroll* v. *United Steelworkers of America*, 107 Idaho 717, 723, 692 P. 2d 361, 367 (1984) (Bistline, J., dissenting) (machinery accident). The Court has identified no basis for its assumption that § 323 has a narrower scope than its plain language and these cases indicate. I thus would not find pre-emption on the mere supposition that the Union's duty runs only to the union members.

II

The Union also argues that the duty of fair representation immunizes it from liability under § 323. Allowing the States to impose tort liability on labor organizations, it contends, would upset the balance of rights and duties that federal law has struck between unions and their members. I disagree because nothing in the NLRA supports the Union's position.

Section 9(a) of the NLRA, 29 U. S. C. § 159(a), grants a duly elected union the exclusive authority to represent all employees in a collective-bargaining unit. We have reasoned:

> "The fair interpretation of the statutory language is that the organization chosen to represent a craft is chosen to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those from whom it is exercised unless so expressed." *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202 (1944) (footnote omitted) (interpretation of § 2(a) of the Railway Labor Act, 45 U. S. C. § 152 (1982 ed.), adopted for § 9(a) of the NLRA in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337 (1953)).

As a result, we have read § 9(a) to establish a duty of fair representation requiring a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967).

Although we have inferred that Congress intended to impose a duty of fair representation in § 9(a), I see no justification for the further conclusion that Congress desired to grant unions an immunity from all state tort law. Nothing about a union's status as the exclusive representative of a bargaining unit creates a need to exempt it from general duties to exercise due care to avoid injuring others. At least to some extent, therefore, I would conclude that Congress "by silence indicate[d] a purpose to let state regulation be imposed." *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 104 (1963).

Our decision in *Farmer* v. *Carpenters*, 430 U. S. 290 (1977), confirms this view. *Farmer* held that the NLRA did not pre-empt a union member's action against his union for intentional infliction of emotional distress. See *id.*, at 305. The union member complained that his union ridiculed him in public and refused to refer jobs to him in accordance with hiring hall rules. See *id.*, at 293. In analyzing this claim, we ruled that the NLRA's pre-emption of state tort law depends on two factors: "the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Id.*, at 297. Both of these factors militated against pre-emption in *Farmer*. Noting that "our cases consistently have recognized the historic state interest in 'such traditionally local matters as public safety and order,'" *id.*, at 299 (quoting *Allen-Bradley Local* v. *Wisconsin Employment Relations Bd.*, 315 U. S. 740, 749 (1942)), we ruled that the tort law addressed proper matters of state concern. We further observed that, although the tort liability for intentional infliction of emotional distress might interfere with the federal prohibition against discrimination by a

union, that "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." 430 U. S., at 304.

The *Farmer* analysis reveals that Idaho may hold the union liable for negligence in inspecting the mine. The strength and legitimacy of the State's interests in mine safety stand beyond question; the Union's failure to exercise due care, according to the allegations, caused or contributed to the deaths of 91 Idaho miners. Allowing this case to proceed to trial, moreover, would pose little threat to the federal regulatory scheme. State courts long have held unions liable for personal injuries under state law. See, *e. g.*, *DiLuzio* v. *United Electrical, Radio, and Machine Workers of America*, 386 Mass. 314, 318, 435 N. E. 2d 1027, 1030 (1982) (assault at workplace); *Brawner* v. *Sanders*, 244 Ore. 302, 307, 417 P. 2d 1009, 1012 (1966) (in banc) (personal injuries); *Marshall* v. *International Longshoremen's and Warehousemen's Union*, 57 Cal. 2d 781, 787, 371 P. 2d 987, 991 (1962) (stumble in union hall parking lot); *Inglis* v. *Operating Engineers Local Union No. 12*, 58 Cal. 2d 269, 270, 373 P. 2d 467, 468 (1962) (assault at union meeting); *Hulahan* v. *Sheehan*, 522 S. W. 2d 134, 139–141 (Mo. App. 1975) (slip and fall on union hall stairs). The Union presents no argument that this long-standing practice has interfered with federal labor regulation. Indeed, as the Court itself holds, nothing in the federal statutory scheme addresses the Union's conduct or provides redress for the injuries that it may have produced. See *ante*, at 373–375.

The Union's position also deviates from the well-established position of the Courts of Appeals. These courts have found pre-emption by the duty of fair representation in two situations. First, the courts have said that the duty of fair fair representation pre-empts state duties that depend on a collective-bargaining agreement or on the union's status as the exclusive collective bargaining agent. See, *e. g.*, *Richardson* v. *United Steelworkers of America*, 864 F. 2d 1162,

1165–1167 (CA5 1989); *Condon* v. *Local 2944, United Steelworkers of America*, 683 F. 2d 590, 595 (CA1 1982). As noted above, however, the Union's duties in this case do not stem from a contract or from its status as a union. Second, other courts have found the federal duty of fair representation to supplant equivalent state-law duties. See, *e. g.*, *Jones* v. *Truck Drivers Local Union No. 299*, 838 F. 2d 856, 861 (CA6 1988) (sex discrimination); *Maynard* v. *Revere Copper Products*, 773 F. 2d 733, 735 (CA6 1985) (handicapped discrimination); *Peterson* v. *Air Line Pilots Assn., International*, 759 F. 2d 1161, 1170 (CA4 1985) (blacklisting). In this case, state law differs from federal law in that the duty of fair representation does not address the conduct in question. The Union, as a result, has shown no support for its contention that the duty of fair representation pre-empts the Idaho tort law. For these reasons, I dissent.

Syllabus

UNITED STATES *v.* MUNOZ-FLORES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–1932. Argued February 20, 1990—Decided May 21, 1990

After respondent pleaded guilty to two federal misdemeanors, a Federal Magistrate, *inter alia*, ordered him to pay, as required by 18 U. S. C. § 3013, a monetary "special assessment" to the Crime Victims Fund established by the Victims of Crime Act of 1984. He moved to correct his sentence, asserting that the assessments were unconstitutional because Congress had passed § 3013 in violation of the Origination Clause, which mandates that "all Bills for raising Revenue shall originate in the House of Representatives." The Magistrate denied the motion, and the District Court affirmed. However, the Court of Appeals reversed, holding that, while respondent's claim did not raise a nonjusticiable political question, § 3013 was a bill for raising revenue that had originated in the Senate and, thus, was passed in violation of the Clause.

Held:

1. This case does not present a nonjusticiable political question. It has none of the characteristics that *Baker* v. *Carr*, 369 U. S. 186, 217, identified as essential to a finding that a case raises such a question. Pp. 389–397.

(a) Invalidating a law on Origination Clause grounds would not evince a "lack of . . . respect," within the meaning of *Baker*, for the House. If disrespect, as the Government uses that term, were sufficient to create a political question, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. Congress often explicitly considers whether bills violate constitutional provisions, and any law's enactment is predicated at least implicitly on a judgment that the law is constitutional. These factors do not foreclose subsequent judicial scrutiny of a law's constitutionality. To the contrary, this Court has a duty to conduct such a review. Pp. 389–391.

(b) The Government's two attempts to distinguish an Origination Clause claim from other constitutional challenges are rejected. First, its argument that the House has the power to protect its institutional interests by refusing to pass a bill if it believes that the Clause has been violated does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments. Even if the House had a greater incentive to safeguard its origination prerogative than it does to refuse to pass a bill that it believes is unconstitutional for other

purposes, the fact that one governmental institution has mechanisms available to guard against incursions into its power by other such institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question. Second, the Government's suggestion that judicial intervention is unwarranted because this case does not involve individual rights is simply irrelevant to the political question doctrine, which is designed to restrain the Judiciary from inappropriate interference in the business of the other branches. The *litigant's* identity is immaterial to the presence of these concerns in a particular case. More fundamentally, the Government's claim is in error. This Court has repeatedly adjudicated separation-of-powers claims brought by people acting in their individual capacities, and provisions for the separation of powers *within* the Legislative Branch are not different in kind from the provisions concerning relations *among* the branches: Both sets of provisions safeguard liberty. Pp. 392–395.

(c) Also rejected is the Government's argument that another *Baker* factor justifies a finding that the case is nonjusticiable: The Court could not fashion "judicially manageable standards" for determining either whether a bill is "for raising Revenue" or where a bill "originates." The Government suggests no reason why a judicial system capable of determining, *e. g.*, when punishment is "cruel and unusual" and when bail is "[e]xcessive" will be unable to develop standards in this context. Pp. 395–396.

(d) JUSTICE STEVENS' theory—that, since the Constitution is silent as to the consequences of an Origination Clause violation, but provides by implication, in Art. I, § 7, cl. 2, that any bill passed by both Houses and signed by the President becomes law, some improperly originated bills may become law—is not supported by the better reading of § 7, which gives effect to all of its Clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law. Although none of the Constitution's commands explicitly sets out a remedy for its violation, the principle that the courts will strike down a law when Congress has passed it in violation of such a command is well settled. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 176–180. Moreover, the logical consequence of JUSTICE STEVENS' view is that the Origination Clause would most appropriately be treated as a constitutional requirement separate from the provisions of § 7 that govern when a bill becomes a "law." Nonethless, saying that a bill becomes "law" within the meaning of the second Clause does not answer the question whether that "law" is unconstitutional. Pp. 396–397.

2. The special assessment statute is not a "Bil[l] for raising Revenue" and, thus, its passage does not violate the Origination Clause. This case falls squarely within the holdings of *Twin City Bank* v. *Nebecker*, 167

U. S. 196, and *Millard* v. *Roberts*, 202 U. S. 429, that a statute that creates, and raises revenue to support, a particular governmental program, as opposed to a statute that raises revenue to support Government generally, is not a "Bil[l] for raising Revenue." The provision was passed as part of, and to provide money for, the Crime Victims Fund. Although any excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize. Any revenue for the general Treasury that § 3013 creates is thus incidental to that provision's primary purpose. The fact that the bill was not designed to benefit the persons from whom the funds were collected is not relevant to a determination whether the bill is a revenue bill. Since § 3013 is not a revenue bill, there is no need to consider whether the Clause would require its invalidation if it were one. Pp. 397–401.

863 F. 2d 654, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 401. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 408.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Clifford M. Sloan*.

Judy Clarke argued the cause for respondent. With her on the brief was *Mario G. Conte*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case raises the question whether 18 U. S. C. § 3013, which requires courts to impose a monetary "special assessment" on any person convicted of a federal misdemeanor, was passed in violation of the Origination Clause of the Constitution. That Clause mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U. S. Const., Art. I, § 7, cl. 1. We conclude initially that this case does not present a political question and therefore reject the Government's argument that the case is not justiciable. On the merits, we hold that the special assessment statute does

not violate the Origination Clause because it is not a "Bil[l] for raising Revenue."

I

In June 1985, German Munoz-Flores was charged with aiding the illegal entry of aliens into the United States. He subsequently pleaded guilty to two misdemeanor counts of aiding and abetting aliens to elude examination and inspection by immigration officers. The Magistrate sentenced respondent to probation and ordered him to pay a special assessment of $25 on each count under the then-applicable version of 18 U. S. C. § 3013 (1982 ed., Supp. V). Pet. for Cert. 27a–28a.

Respondent moved to correct his sentence, asserting that the special assessments were unconstitutional because Congress had passed § 3013 in violation of the Origination Clause. The Magistrate denied the motion, and the District Court affirmed. *Id.*, at 26a. On appeal, the Ninth Circuit vacated the portion of the District Court's sentencing order that imposed the special assessments. 863 F. 2d 654 (1988). The court held that respondent's claim did not raise a nonjusticiable political question. *Id.*, at 656–657. On the merits, the court ruled that § 3013 was a "Bil[l] for raising Revenue," *id.*, at 657–660, and that it had originated in the Senate because that Chamber was the first to pass an assessment provision, *id.*, at 660–661. The court therefore concluded that § 3013 had been passed in violation of the Origination Clause. *Id.*, at 661.

The United States petitioned for a writ of certiorari, arguing that § 3013 did not violate the Origination Clause.[1] The

[1] The Ninth Circuit's ruling that § 3013 was passed in violation of the Origination Clause is inconsistent with the holdings of the other six Courts of Appeals that have considered the issue. See *United States* v. *Griffin*, 884 F. 2d 655, 656–657 (CA2 1989) (§ 3013 not a "Bil[l] for raising Revenue"); *United States* v. *Simpson*, 885 F. 2d 36, 40 (CA3 1989) (same); *United States* v. *Herrada*, 887 F. 2d 524, 527 (CA5 1989) (same); *United States* v. *Ashburn*, 884 F. 2d 901, 903 (CA6 1989) (same); *United States* v.

Government noted that the Ninth Circuit had rejected its argument that the case raised a political question, Pet. for Cert. 5, n. 5, but did not ask this Court to review that ruling. We granted certiorari and directed the parties to brief the political question issue. 493 U. S. 808 (1989).[2]

II

A

In *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), this Court identified the features that characterize a case raising a nonjusticiable political question:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibil-

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Tholl, 895 F. 2d 1178, 1181–1182 (CA7 1990) (same); *United States* v. *King*, 891 F. 2d 780, 782 (CA10 1989) (same).

[2] This Court has reserved the question whether "there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated." *Rainey* v. *United States*, 232 U. S. 310, 317 (1914). The Court has, however, resolved an Origination Clause claim without suggesting that the claim might be nonjusticiable. *Millard* v. *Roberts*, 202 U. S. 429, 436–437 (1906).

No Court of Appeals has held that an Origination Clause challenge to § 3013 raises a political question. The Ninth Circuit in this case rejected the claim that the issue raises a political question, 863 F. 2d 654, 656–657 (1988), and the Third Circuit has reached the same conclusion, *Simpson*, *supra*, at 38–39. Three Circuits have addressed the merits of an Origination Clause claim without mentioning the political question doctrine, *Griffin*, *supra*; *Ashburn*, *supra*; *King*, *supra*; and two Circuits have refused to decide whether the issue raises a political question, *Herrada*, *supra*, at 525, and n. 1; *Tholl*, *supra*, at 1181–1182, n. 7. But cf. *Texas Assn. of Concerned Taxpayers, Inc.* v. *United States*, 772 F. 2d 163 (CA5 1985) (holding that an Origination Clause challenge to the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324, presented a nonjusticiable political question).

> ity of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Accord, *INS* v. *Chadha*, 462 U. S. 919, 941 (1983) (quoting *Baker*, *supra*, at 217).

The United States contends that "[t]he most persuasive factor suggesting nonjusticiability" is the concern that courts not express a "lack of . . . respect" for the House of Representatives. Brief for United States 10.[3] In the Government's view, the House's passage of a bill conclusively establishes that the House has determined either that the bill is not a revenue bill or that it originated in the House. Hence, the Government argues, a court's invalidation of a law on Origination Clause grounds would evince a lack of respect for the House's determination. The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. Congress often explicitly considers

[3] The Government does not argue that *all* of the factors enunciated in *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), suggest that this case raises a political question. The Government concedes that no provision of the Constitution demonstrably commits to the House of Representatives the determination of where a bill originated. Brief for United States 9. Moreover, the Government does not suggest that answering the origination question requires any sort of "initial policy determination" that courts ought not make or that the question presents an "unusual need for unquestioning adherence to a political decision already made." Nor does it suggest that there is any more danger of "multifarious pronouncements" in this context than in any other in which a court determines the constitutionality of a federal law. *Baker* v. *Carr*, *supra*, at 217.

whether bills violate constitutional provisions. See, *e. g.*, 135 Cong. Rec. 23121–23122 (1989) (remarks of Sen. Biden) (expressing the view that the Flag Protection Act of 1989, 103 Stat. 777, does not violate the First Amendment); 133 Cong. Rec. 30498–30499 (1987) (remarks of Sen. Hatch) (arguing that the independent counsel law, 28 U. S. C. § 591 *et seq.*, was unconstitutional). Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional. Indeed, one could argue that Congress explicitly determined that this bill originated in the House because it sent the bill to the President with an "H. J. Res." designation. See *post*, at 409 (SCALIA, J., concurring in judgment). Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one the Government makes here: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell* v. *McCormack*, 395 U. S. 486, 549 (1969).[4]

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[4]JUSTICE SCALIA apparently would revisit *Powell*. He contends that Congress' resolution of the constitutional question in passing the bill bars this Court from independently considering that question. The only case he cites for his argument is *Marshall Field & Co.* v. *Clark*, 143 U. S. 649 (1892). But *Field* does not support his argument. That case concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. *Id.*, at 670. Appellants had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its Proceedings" implied that whether a bill had passed must be determined by an examination of the journals. See *ibid.* (quoting Art. I, § 5) (internal quotation marks omitted). The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to

The United States seeks to differentiate an Origination Clause claim from other constitutional challenges in two ways. The Government first argues that the House has the power to protect its institutional interests by refusing to pass a bill if it believes that the Origination Clause has been violated. Second, the Government maintains that the courts should not review Origination Clause challenges because compliance with that provision does not significantly affect individual rights. Of course, neither the House's power to protect itself nor the asserted lack of a connection between the constitutional claim and individual rights is a factor that *Baker* identifies as characteristic of cases raising political questions. Rather, the Government attempts to use its arguments to establish that judicial resolution of Origination Clause challenges would entail a substantial lack of respect for the House, a factor that *Baker does* identify as relevant to the political question determination. Neither of the Government's arguments persuades us.

Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments. See *supra*, at 391. Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review. As an initial matter, we are unwilling to presume that the House has a greater incentive to safeguard its origination power than it does to refuse to pass a bill that it believes is unconstitutional for other reasons. Such a presumption would demonstrate a profound lack of respect for a coordinate branch of Government's pledge to uphold the *entire* Constitu-

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Congress to determine how a bill is to be authenticated as having passed. *Id.*, at 670–671. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. *Id.*, at 672. Where, as here, a constitutional provision *is* implicated, *Field* does not apply.

tion, not just those provisions that protect its institutional prerogatives.

Even if we were to assume that the House does have more powerful incentives to refuse to pass legislation that violates the Origination Clause, that assumption would not justify the Government's conclusion that the Judiciary has no role to play in Origination Clause challenges. In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institututional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims, often without suggesting that they might raise political questions. See, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 371–379 (1989) (holding that Sentencing Reform Act of 1984, 18 U. S. C. § 3551 *et seq.*, and 28 U. S. C. § 991 *et seq.*, did not result in Executive's wielding legislative powers, despite either House's power to block Act's passage); *Morrison* v. *Olson*, 487 U. S. 654, 685–696 (1988) (holding that independent counsel provision of Ethics in Government Act of 1978, 28 U. S. C. § 591 *et seq.*, is not a congressional or judicial usurpation of executive functions, despite President's veto power); *INS* v. *Chadha*, 462 U. S. 919 (1983) (explicitly finding that separation-of-powers challenge to legislative veto presented no political question). In short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.

The Government's second suggestion—that judicial intervention in this case is unwarranted because the case does not involve individual rights—reduces to the claim that a person suing in his individual capacity has no direct interest in our constitutional system of separation of powers, and thus has no corresponding right to demand that the Judiciary ensure the integrity of that system. This argument is simply irrele-

vant to the political question doctrine. That doctrine is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case. And we are unable to discern how, from the perspective of interbranch relations, the asserted lack of connection between Origination Clause claims and individual rights means that adjudication of such claims would necessarily entail less respect for the House than would judicial consideration of challenges based on constitutional provisions more obviously tied to civil liberties.

Furthermore, and more fundamentally, the Government's claim that compliance with the Origination Clause is irrelevant to ensuring individual rights is in error. This Court has repeatedly emphasized that "'the Constitution diffuses power the better to secure liberty.'" *Morrison*, *supra*, at 694 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)). See also *Morrison*, *supra*, at 697 (SCALIA, J., dissenting) ("The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government"). Recognizing this, the Court has repeatedly adjudicated separation-of-powers claims brought by people acting in their individual capacities. See, *e. g.*, *Mistretta*, *supra* (adjudicating claim that United States Sentencing Commission violates separation of powers on direct appeal by an individual defendant who had been sentenced pursuant to guidelines created by the Commission).

What the Court has said of the allocation of powers *among* branches is no less true of such allocations *within* the Legislative Branch. See, *e. g.*, *Chadha*, *supra*, at 948–951 (bicameral National Legislature essential to protect liberty); The Federalist No. 63 (defending bicameral Congress on ground that each House will keep the other in check). The Constitution allocates different powers and responsibilities to the House and Senate. Compare, *e. g.*, U. S. Const., Art. II,

§ 2, cl. 2 (giving Senate "Advice and Consent" power over treaties and appointment of ambassadors, judges, and other officers of the United States), with Art. I, § 7, cl. 1 (stating that "[a]ll Bills for raising Revenue shall originate in the House of Representatives"). The authors of the Constitution divided such functions between the two Houses based in part on their perceptions of the differing characteristics of the entities. See The Federalist No. 58 (defending the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue); The Federalist No. 64 (justifying advice and consent function of the Senate on the ground that representatives with longer terms would better serve complex national goals). At base, though, the Framers' purpose was to protect individual rights. As James Madison said in defense of that Clause: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). Provisions for the separation of powers within the Legislative Branch are thus *not* different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.

The Government also suggests that a second *Baker* factor justifies our finding that this case is nonjusticiable: The Court could not fashion "judicially manageable standards" for determining either whether a bill is "for raising Revenue" or where a bill "originates." We do not agree. The Government concedes, as it must, that the "general nature of the inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function." Brief for United States 9. To be sure, the courts must develop standards for making the revenue and origination determinations, but the Government

suggests no reason that developing such standards will be more difficult in this context than in any other. Surely a judicial system capable of determining when punishment is "cruel and unusual," when bail is "[e]xcessive," when searches are "unreasonable," and when congressional action is "necessary and proper" for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.

In short, this case has none of the characteristics that *Baker* v. *Carr* identified as essential to a finding that a case raises a political question. It is therefore justiciable.

B

Although JUSTICE STEVENS agrees with the Government that this Court should not entertain Origination Clause challenges, he relies on a novel theory that the Government does not advance. He notes that the Constitution is silent as to the consequences of a violation of the Origination Clause, but that it provides by implication that any bill that passes both Houses and is signed by the President becomes a law. See Art. I, § 7, cl. 2; *post*, at 401–403, and n. 1. From this JUSTICE STEVENS infers the proposition that "some bills may become law even if they are improperly originated." *Post*, at 403.

We cannot agree with JUSTICE STEVENS' approach. The better reading of § 7 gives effect to *all* of its Clauses in determining what procedures the Legislative and Executive Branches must follow to enact a law. In the case of "Bills for raising Revenue," § 7 requires that they originate in the House before they can be properly passed by the two Houses and presented to the President. The Origination Clause is no less a requirement than the rest of the section because "it does not specify what consequences follow from an improper origination," *post*, at 402. None of the Constitution's commands explicitly sets out a remedy for its violation. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command

has been well settled for almost two centuries. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 176–180 (1803). That principle applies whether or not the constitutional provision expressly describes the effects that follow from its violation.

Even were we to accept JUSTICE STEVENS' contrary view—that § 7 provides that a bill becomes a "law" even if it is improperly originated—we would not agree with his conclusion that no remedy is available for a violation of the Origination Clause. Rather, the logical consequence of his view is that the Origination Clause would most appropriately be treated as a constitutional requirement separate from the provisions of § 7 that govern when a bill becomes a "law." Of course, saying that a bill becomes a "law" within the meaning of the second Clause does not answer the question whether that "law" is *constitutional*. To survive this Court's scrutiny, the "law" must comply with all relevant constitutional limits. A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.[5]

III

Both parties agree that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U. S. 196, 202 (1897) (citing 1 J. Story, Commentaries on the Constitution § 880, pp. 610–611 (3d ed. 1858)). The Court has interpreted this

[5] In an attempt to resurrect in another guise an argument that we have rejected, see *supra*, at 392–394, JUSTICE STEVENS seeks to differentiate the Origination Clause from such other constitutional provisions by suggesting that the House would more effectively ensure compliance with the Clause than would this Court. *Post*, at 403–406. Yet he apparently concedes that this case is justiciable despite his argument that the House is a better forum than the Judiciary for the resolution of Origination Clause disputes. The reasoning does not become persuasive merely because it is used for a different purpose, and we continue to reject it.

general rule to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a "Bil[l] for raising Revenue" within the meaning of the Origination Clause. For example, the Court in *Nebeker* rejected an Origination Clause challenge to what the statute denominated a "tax" on the circulating notes of banking associations. Despite its label, "[t]he tax was a means for effectually accomplishing the great object of giving to the people a currency . . . . There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government." *Nebeker*, *supra*, at 203. The Court reiterated the point in *Millard* v. *Roberts*, 202 U. S. 429 (1906), where it upheld a statute that levied property taxes in the District of Columbia to support railroad projects. The Court rejected an Origination Clause claim, concluding that "[w]hatever taxes are imposed are but means to the purposes provided by the act." *Id.*, at 437.

This case falls squarely within the holdings in *Nebeker* and *Millard*. The Victims of Crime Act of 1984 established a Crime Victims Fund, 98 Stat. 2170, 42 U. S. C. § 10601(a) (1982 ed., Supp. II), as a federal source of funds for programs that compensate and assist crime victims. See § 10601(d) (allocating moneys among programs); § 10602 (delineating eligible compensation programs); § 10603 (delineating eligible assistance programs). The scheme established by the Act includes various mechanisms to provide money for the Fund, including the simultaneously enacted special assessment provision at issue in this case. § 10601(b)(2). Congress also specified, however, that if the total income to the Fund from all sources exceeded $100 million in any one year, the excess would be deposited in the general fund of the Treasury. § 10601(c)(1).[6] Although nothing in the text or the legislative

[6] The statute has since been amended to provide a cap of $125 million through fiscal year 1991. 102 Stat. 4419, 42 U. S. C. § 10601(c)(1)(B)(i).

[Footnote 6 is continued on p. 399]

history of the statute explicitly indicates whether Congress expected that the $100 million cap would ever be exceeded, in fact it never was. The Government reports that the first and only excess occurred in fiscal year 1989, when the cap stood at $125 million and receipts were between $133 million and $134 million, Brief for United States 21, n. 21, a claim respondent does not dispute, Brief for Respondent 19, n. 16.

Moreover, only a small percentage of any excess paid into the General Treasury can be attributed to the special assessments. The legislative history of the special assessment provision indicates that Congress anticipated that "substantial amounts [would] not result" from that source of funds. S. Rep. No. 98–497, p. 13 (1984). Reality has accorded with Congress' prediction. See U. S. Dept. of Justice, Office for Victims of Crime, Office of Justice Programs, Victims of Crime Act of 1984: A Report to Congress by the Attorney General 12 (1988) (§ 3013 revenues accounted for four percent of all deposits into the Fund received by United States Attorneys' Offices for fiscal year 1987). Four percent of a minimal and infrequent excess over the statutory cap is properly considered "incidenta[l]."

As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program—the Crime Victims Fund. Although any excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize. Any revenue for the general Treasury that § 3013 creates is thus "incidenta[l]" to that provision's primary purpose. This conclusion is reinforced, not undermined, by the Senate Report that respondent claims establishes that § 3013 is a "Bil[l] for raising Revenue." That Report reads: "The purpose of

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The amendment also provides that the Judicial Branch will receive the first $2.2 million of excess collections to cover the costs of assessing and collecting criminal fines. § 10601(c)(1)(A). After fiscal year 1991, the cap will be $150 million through fiscal year 1994. § 10601(c)(1)(B)(ii).

imposing nominal assessment fees is to generate needed income to offset the cost of the [Crime Victims Fund]. Although substantial amounts will not result, these additional amounts will be helpful in financing the program *and will constitute new income for the Federal government.*" S. Rep. No. 98–497, *supra*, at 13–14 (emphasis added). Respondent's reliance on the emphasized portion of the quoted passage avails him nothing. Read in its entirety, the passage clearly evidences Congress' intent that § 3013 provide funds primarily to support the Crime Victims Fund.

Respondent next contends that even if § 3013 is directed entirely to providing support for the Crime Victims Fund, it still does not fall within the ambit of *Nebeker* or *Millard*. Respondent accurately notes that the § 3013 assessments are not collected for the benefit of the payors, those convicted of federal crimes. He then contends, citing *Nebeker* and *Millard*, that any bill that provides for the collection of funds is a revenue bill unless it is designed to benefit the persons from whom the funds are collected. Respondent misreads *Nebeker* and *Millard*. In neither of those cases did the Court state that a bill *must* benefit the payor to avoid classification as a revenue bill. Indeed, had the Court adopted such a caveat, the Court in *Nebeker* would have found the statute to be unconstitutional. There, the Court expressly identified the "people" generally, rather than the banking associations required to pay the tax, as the beneficiaries of the system of currency at issue. 167 U. S., at 203. It nevertheless found that the bill was not a revenue bill, stating that a bill creating a discrete governmental program and providing sources for its financial support is not a revenue bill simply because it creates revenue, a holding that was reaffirmed by *Millard*. See *supra*, at 397–398. Thus, the beneficiaries of the bill are not relevant.[7]

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[7] A different case might be presented if the program funded were entirely unrelated to the persons paying for the program. Here, § 3013 targets people convicted of federal crimes, a group to which some part of the expenses associated with compensating and assisting victims of crime can

Section 3013 is not a "Bil[l] for raising Revenue." We therefore need not consider whether the Origination Clause would require its invalidation if it *were* a revenue bill. *Nebeker*, 167 U. S., at 203 (holding consideration of origination question "unnecessary" in light of finding that bill was not a revenue bill).

IV

We hold that this case does not raise a political question and is justiciable. Because the bill at issue here was not one for raising revenue, it could not have been passed in violation of the Origination Clause. The contrary judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

In my opinion, a bill that originated unconstitutionally may nevertheless become an enforceable law if passed by both Houses of Congress and signed by the President. I therefore believe that it is not necessary to decide whether 18 U. S. C. § 3013 was passed in violation of the Origination Clause.

I

The Origination Clause appears in Article I, § 7, of the Constitution, which describes the procedures that the two Houses of Congress and the President shall follow when enacting laws.[1] The Origination Clause is the first of three

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fairly be attributed. Whether a bill would be "for raising Revenue" where the connection between payor and program was more attenuated is not now before us.

[1] The first two paragraphs of § 7 provide in full:

"All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return

Clauses in that section. The Clause provides that "All Bills for raising Revenue shall originate in the House of Representatives," but it does not specify what consequences follow from an improper origination.

The immediately following Clause, however, does speak to consequences. The second Clause of § 7 says, among other things, that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." An improperly originated bill passed by both Houses would seem to be within a class comprising "Every" bill passed by both Houses, and it therefore seems reasonable to assume that such an improperly originated bill is among those that "shall . . . be presented to the President." The Clause further states that if the President returns to Congress a bill presented to him, and if two-thirds of each House thereafter approves the bill, "it shall become a Law." No exception to this categorical statement is made for bills improperly originated.

The second Clause of § 7 later provides that "any Bill" not acted upon by the President within 10 days "shall be a Law, in like Manner as if he had signed it." In this instance, one express exception is made: If Congress adjourns before the

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it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

10-day period expires, the bill "shall not be a Law." Again, no exception is made for bills improperly originated.

It is fairly inferred from this language that some bills may become law even if they are improperly originated. It does not, however, necessarily follow that the bill now at issue became law even if improperly originated. That bill is not governed by the provisions just discussed, because it was signed by the President and hence did not become law by virtue of either Presidential inaction or the override of a veto. The language in § 7 dealing with bills signed by the President speaks in terms of necessary, rather than sufficient, conditions: The Clause states only that bills must be presented to the President and that if "he approves he shall sign it." The Clause does not say that any bill signed by the President becomes law, although it does later say that a bill not acted upon becomes law "in like Manner as if he had signed it." In my view, the sufficiency of the procedural conditions in the second Clause is reasonably supplied by implication. I accordingly interpret § 7 to provide that even an improperly originated bill becomes law if it meets the procedural requirements specified later in that section.

II

My reading of the text of § 7 is supported by examination of the Constitution's purposes. I agree with the Court that the purpose of the Origination Clause is to give the most "'immediate representatives of the people'"—Members of the House, directly elected and subject to ouster every two years—an "effectual weapon" for securing the interests of their constituents. *Ante*, at 395, quoting The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). For four reasons, I believe that examination of this purpose supports the view that the binding force of an otherwise lawfully enacted bill is not vitiated by an Origination Clause violation.

First, the House is in an excellent position to defend its origination power. A bill that originates in the Senate,

whether or not it raises revenue, cannot become law without the assent of the House. The House is free to rely upon the Origination Clause to justify its position in a debate with the Senate, regardless of whether constitutional concerns alone drive the House's position. See Bessette & Tulis, The Constitution, Politics, and the Presidency 8–16, in The Presidency in the Constitutional Order (J. Bessette & J. Tulis, eds., 1981) (discussing ways, aside from judicial enforcement, in which the Constitution shapes political behavior). The Senate may expect that an improperly originated bill will confront a coalition in the House, composed of those who oppose the bill on substantive grounds and those who would favor it on substantive grounds but regard the procedural error as too important to ignore. Taxes rarely go unnoticed at the ballot box, and there is every reason to anticipate that Representatives subject to reelection every two years will jealously guard their power over revenue-raising measures.[2]

Second, the House has greater freedom than does the Judiciary to construe the Origination Clause wisely.[3] The House

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[2] The Court properly observes that the House has an interest in upholding "the *entire* Constitution, not just those provisions that protect its institutional prerogatives." *Ante*, at 392–393 (emphasis in original). I agree. It is, however, true that even if the House should mistake its constitutional interest generally, it is unlikely to mistake its more particular interest in being powerful: That specific interest is instrumental to any broader conception the House might have of its duties and interests.

Nevertheless, the Court is again correct to say that the possibility of legislative enforcement does not supply a prudential, nonconstitutional justification for abstaining from constitutional interpretation. *Ibid.* My point is rather that this possibility is relevant to the substantive task of interpreting § 7 itself.

[3] Respondent observes that the House "has not assumed that it is the final arbiter of the Origination Clause," but has instead "looked to court decisions for guidance in determining whether to return bills to the Senate." Brief for Respondent 11. Although respect for our power of judicial review is a constitutional necessity in the ordinary case, it is not clear that the House's deference is either necessary or wise with respect to this issue. Indeed, a decision by this Court to pass upon Origination Clause

may, for example, choose to interpret "Bills for raising Revenue" by invoking a test that turns largely upon the substantive economic impact of the measure on society as a whole, or may determine the House of origination by identifying the legislators who were most responsible for the content of the final version of the bill. If employed by the House, rather than the Judiciary, inquiries so searching obviously create no tension between enforcement of the Origination Clause and the democratic principle of the legislative process—a principle which the Clause itself is designed to serve. The House may also examine evidence, including informal private disclosures, unavailable (or incomprehensible) to the Judiciary.

Third, the House is better able than this Court to judge the prejudice resulting from an Origination Clause violation, and so better able than this Court to judge what corrective action, if any, should be taken. The nature of such a power may be comprehended by analogy to our own recognition that a constitutional defect in courtroom procedure does not necessarily vitiate the outcome of that procedure. See *Chapman* v. *California*, 386 U. S. 18 (1967). I see no reason to believe that a defect in statehouse procedure cannot also be harmless: A tax originated in the Senate may nevertheless reflect the views of the people as interpreted by the House, whether because of a coincidence in the judgment of the two branches or because the House directly influenced the Senate's labor. The House's assent to an improperly originated bill is unlikely to be given if its Members believe that the procedural defect harmed the bill's substance. Yet, it would be difficult to imagine how this Court could reasonably assess the prejudice resulting from any particular Origination Clause violation. On my interpretation of § 7, the Constitution confides this responsibility to the House of Representatives instead. One consequence of this interpretation is that an expansive construction of the Clause by the House need

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questions may be an unfortunate inducement to the House to forbear from an independent inquiry into the interpretive issues posed by the Clause.

not impose spurious formalities, since spurious violations may be ignored.

Fourth, the violation complained of by respondent is unlike those constitutional problems which we have in the past recognized as appropriate for judicial supervision.[4] This case is not one involving the constitutionality of statutes alleged to effect prospective alterations in the constitutional distribution of power. See *INS* v. *Chadha*, 462 U. S. 919 (1983); *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Morrison* v. *Olson*, 487 U. S. 654 (1988). No defect in the representative process threatens to impede a democratic solution to the problem at issue. See *Powell* v. *McCormack*, 395 U. S. 486 (1969); *Reynolds* v. *Sims*, 377 U. S. 533 (1964). No claim is made that this statute deals with subjects outside the sweep of congressional power, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), or that the statute abrogates the substantive and procedural guarantees of the Bill of Rights, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1 (1976). Nor, finally, does respondent contend that the Constitution has been violated because action has been taken in derogation of structural bulwarks designed either to safeguard groups specially in need of judicial protection, or to tame the majoritarian tendencies of American politics more generally. See *Chadha*, *supra*; *Powell*, *supra*; *United States* v. *Carolene Products*, 304 U. S. 144, 152, n. 4 (1938); *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976). Indeed, this case presents perhaps the weakest imaginable justification for judicial invalidation of a statute: Respondent contends that the Judiciary must intervene in order to protect a power of the most majoritarian body in the Federal Government, even though that body has an absolute veto over any

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[4] This observation bears upon the plausibility of an interpretation of the Origination Clause that effectively insulates origination problems from judicial review. See *Cohens* v. *Virginia*, 6 Wheat. 264, 384–385 (1821).

effort to usurp that power. The democratic structure of the Constitution ensures that the majority rarely if ever needs such help from the Judiciary.[5]

These considerations reinforce my construction of the text of § 7 and lead me to conclude that the statute before us is law regardless of whether it was improperly originated. As a practical matter, this reading of the Constitution precludes judicial review of alleged violations of the Origination Clause. It is up to the House of Representatives to enforce that provision by refusing its consent to any revenue bills that originate in the Senate.[6] The Court's holding, however, may itself be not too far removed from such a consequence: The Court's essential distinction between revenues allocated to particular programs and those allocated to the General Treasury, *ante*, at 397–398, tends to convert the Origination Clause

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[5] I agree with the Court that the Origination Clause is intended to "safeguard liberty." *Ante*, at 395. Indeed, this must be true, in a general sense, of almost every constitutional provision, since the Constitution aims to "secure the Blessings of Liberty." U. S. Const., Preamble. Of course, the Constitution aims as well to create a Government able to "promote the general Welfare," but liberty and welfare should ultimately coincide.

I also believe, however, that some constitutional provisions are designed to protect liberty in a more specific sense: They protect the rights of individuals as against the majority. Other provisions give the majority sufficient power to act effectively, within limits. In this sense, the First Amendment secures liberty in a way that the Origination Clause does not.

[6] The President obviously might choose to enforce the provision by vetoing an improperly originated bill. It seems clear that the President has the power to do so; it is less clear whether the President has any constitutional duty to police the internal processes of the Congress, or whether he has instead a constitutional duty to defer to Congress on such matters. These issues must be determined by the President; they are not ones we need resolve. It is noteworthy, however, that Article I, § 7, does supply a textual basis for inferring that the President has some constitutional responsibility with respect to matters of origination: Upon vetoing a bill, the President must return it to the House "in which it shall have originated." That phrase is manifestly ambiguous in the case of an improperly originated bill.

into a formal accounting requirement, so long as the House consents.[7]

In all events, I think that both a literal and a practical interpretation of the Origination Clause is consistent with the conclusion that a revenue bill becomes a law whenever it is passed by both Houses of Congress and duly signed by the President. Accordingly, I concur in the Court's judgment.

JUSTICE SCALIA, concurring in the judgment.

Marshall Field & Co. v. *Clark*, 143 U. S. 649 (1892), held that federal courts will not inquire into whether the enrolled bill was the bill actually passed by Congress:

> "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. . . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution." *Id.*, at 672.

[7] The Court's interpretation of the Clause does not appear to prevent the House from interpreting the Clause more aggressively, although the Court does effectively deny the House the power to "deem harmless" a violation of the Clause.

This salutary principle is also supported by the uncertainty and instability that would result if every person were "'required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not.'" *Id.*, at 677 (quoting *Weeks* v. *Smith*, 81 Me. 538, 547, 18 A. 325, 327 (1889)).

The same principle, if not the very same holding, leads me to conclude that federal courts should not undertake an independent investigation into the origination of the statute at issue here. The enrolled bill which, when signed by the President, became the Victims of Crime Act of 1984, 98 Stat. 2170, bore the indication "H. J. Res. 648." The designation "H. J. Res." (a standard abbreviation for "House Joint Resolution") attests that the legislation originated in the House. Such an attestation is not explicitly required by the Constitution, but is reasonably necessary to the operation of Art. I, § 7, cl. 2, which requires the President, if he desires to veto a bill, to "return it, with his Objections to that House in which it shall have originated." The President can hardly be expected to search the legislative journals (if they have even been printed by the time his veto must be cast) in order to determine where to direct his veto message. Indeed, it can be said that the attestation is reasonably necessary to the operation of Art. I, § 7, cl. 1 (the Revenue-Origination Clause), itself. The President, after all, is bound not to *sign* an improperly originated revenue bill by the same oath that binds us not to *apply* it, so he must have a ready means of knowing whence it came.

The enrolled bill's indication of its House of origin establishes that fact as officially and authoritatively as it establishes the fact that its recited text was adopted by both Houses. With respect to either fact a court's holding, based on its own investigation, that the representation made to the President is incorrect would, as *Marshall Field* said, manifest a lack of respect due a coordinate branch and produce un-

certainty as to the state of the law. I cannot imagine this Court's entertaining a claim that purportedly vetoed legislation took effect because, although the President returned it to the House of origination indicated on the enrolled bill, that was not the *real* house of origination. It should similarly accept the congressional representation in the present case. We should no more gainsay Congress' official assertion of the origin of a bill than we would gainsay its official assertion that the bill was passed by the requisite quorum, see Art. I, § 5, cl. 1; or any more than Congress or the President would gainsay the official assertion of this Court that a judgment was duly considered and approved by our majority vote. Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value.

This disposition does not place forever beyond our reach the only issue in this area that seems to me appropriate for judicial rather than congressional resolution: what sort of bills constitute "Bills for raising Revenue," Art. I, § 7, cl. 1. Whenever Congress wishes to preserve the possibility of a judicial determination on this point, all it need do is originate the bill that contains the arguably revenue-raising measure in the Senate, indicating such origination on the enrolled bill, as by the caption "S. J. Res." This Court may thereby have the last word on what constitutes a bill for raising revenue, and Congress the last word on where a particular bill has originated—which seems to me as it should be.

For these reasons, I concur in the judgment of the Court.

HUGHEY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-5691. Argued March 27, 1990—Decided May 21, 1990

Pursuant to a plea agreement, petitioner Hughey pleaded guilty to using one unauthorized MBank credit card. Under the restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA)—which authorize federal courts to order "a defendant convicted of an offense" to "make restitution to any victim of such offense," 18 U. S. C. § 3579(a)(1) (1982 ed., Supp. IV)—the District Court ordered Hughey to pay $90,431 in restitution, the total of MBank's losses relating to his alleged theft and use of 21 cards from various MBank cardholders. Denying Hughey's motion to reduce and correct his sentence, the court rejected his argument that it had exceeded its authority in ordering restitution for offenses other than the offense of conviction. The Court of Appeals affirmed.

Held: A VWPA restitution award is authorized only for the loss caused by the specific conduct that is the basis of the offense of conviction. Pp. 415-422.

(a) VWPA's plain language clearly links restitution to the offense of conviction. Given that the ordinary meaning of "restitution" is restoring someone to a position he occupied before a particular event, § 3579's repeated focus on the offense of conviction suggests strongly that restitution is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction. The Government's view that § 3579(a) merely identifies the victim, but that the restitution amount is calculated in accordance with § 3580(a)—which delineates "[p]rocedure[s] for issuing" restitution orders—is unconvincing. Section 3579(b), by giving detailed substantive guidance regarding the calculation of restitution, establishes the amount of restitution that courts can award. In addition, to regard § 3580 rather than § 3579 as fixing the substantive boundaries of such orders would ignore this Court's commitment to "giving effect to the meaning and placement of the words chosen by Congress." *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 645. More significantly, because a general statutory term should be understood in light of the specific terms that surround it, § 3580(a)'s catchall phrase—which directs courts to consider "such other factors as the court deems appropriate" in calculating the amount of restitution—should not be read to introduce into the calculus losses that would

expand a defendant's liability beyond the offense of conviction. That phrase is preceded by more specific considerations for determining whether to order, and the amount of, restitution, all of which are designed to limit, rather than to expand, the scope of any restitution order. Pp. 415–420.

(b) Any policy questions surrounding VWPA's offense-of-conviction limitation on restitution orders need not be resolved. Even were the statutory language ambiguous, longstanding principles of lenity preclude the resolution of the ambiguity against Hughey on the basis of general declarations of policy in the statute and legislative history. Pp. 420–422.

877 F. 2d 1256, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined, and in which WHITE and KENNEDY, JJ., joined except as to Part II–C.

Lucien B. Campbell argued the cause and filed briefs for petitioner.

Amy L. Wax argued the cause *pro hac vice* for the United States. With her on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Shapiro*.*

JUSTICE MARSHALL delivered the opinion of the Court.†

The restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA), 18 U. S. C. §§ 3579, 3580 (1982 ed. and Supp. IV), authorize federal courts, when sentencing defendants convicted of certain offenses, to order, "in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U. S. C. § 3579(a)(1) (1982 ed., Supp. IV). We must decide whether these provisions allow a court to order a defendant who is charged with multiple offenses but who is con-

Victor A. Kovner and *Leonard J. Koerner* filed a brief for the City of New York as *amicus curiae* urging affirmance.

Thomas W. Brunner and *Richard H. Gordin* filed a brief for the Insurance Crime Prevention Institute et al. as *amici curiae*.

†JUSTICE WHITE and JUSTICE KENNEDY join all but Part II–C of this opinion.

victed of only one offense to make restitution for losses related to the other alleged offenses. We hold that the language and structure of the Act make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.[1]

I

In 1986, petitioner Frasiel L. Hughey was indicted for three counts of theft by a United States Postal Service employee and three counts of use of unauthorized credit cards. Petitioner pleaded guilty to count 4 of the indictment in exchange for the Government's agreement to dismiss the remaining counts and to forgo prosecution "for any other offense arising in the Western District of Texas as part of the scheme alleged in the indictment." App. 7. Count 4 charged "[t]hat on or about October 18, 1985, . . . [petitioner]

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[1] The restitution provisions in effect at the time of petitioner's sentencing were recodified, effective November 1, 1987, pursuant to the Sentencing Reform Act of 1984, 98 Stat. 1987. Thus, 18 U. S. C. § 3579 now appears as 18 U. S. C. § 3663, and 18 U. S. C. § 3580 appears as 18 U. S. C. § 3664. We will refer to the provisions as they were codified at the time of petitioner's sentencing in April 1987. See 18 U. S. C. §§ 3579, 3580 (1982 ed.).

Additionally, in 1986 Congress amended the language of § 3579(a), replacing "victim of the offense" with "victim of such offense." Criminal Law and Procedure Technical Amendments Act of 1986, 100 Stat. 3619. The amendment—making this sole change—became effective on the date of its enactment, *ibid.*, which was after petitioner committed the offense but prior to his sentencing. The parties agree that the change in language was not intended to alter the meaning of the provision. See H. R. Rep. No. 99–334, p. 7 (1985). But they disagree as to which version of the Act governs, because the House Report accompanying the amendment arguably supports petitioner's view that VWPA does not authorize courts to order restitution for losses beyond those caused by the offense of conviction. We agree with the implicit conclusion of the court below that the amended version applies to this case, see 877 F. 2d 1256, 1258 (CA5 1989), though we note that our construction of the statute does not turn on the minor change in the language or on the legislative history accompanying the amendment, see n. 5, *infra*.

did knowingly and with intent to defraud use an unauthorized [MBank Mastercard credit card] issued to Hershey Godfrey, . . . and by such conduct did obtain things of value aggregating more than $1,000 . . . ." *Id.*, at 5. During the plea proceeding and as part of the factual basis of petitioner's plea, the Government proffered evidence that petitioner had stolen not only Godfrey's card, but also at least 15 other cards. *Id.*, at 10. Petitioner's counsel informed the court at that time that petitioner's plea was confined to the allegations in count 4 and that petitioner did "not mak[e] admissions to anything other than the facts pertaining to count four." *Id.*, at 11.

After the plea hearing but before sentencing, the Government notified petitioner that it would propose that he be ordered to pay restitution of $147,646.89. The Government calculated that figure by adding the losses of several financial institutions, including MBank, that resulted from petitioner's alleged theft and use of approximately 30 credit cards. Petitioner objected to the proposed restitution order on the ground that the proposed figure was unauthorized because it "exceed[ed] the losses of any victims of the offense of which the Defendant was convicted." *Id.*, at 13. The Government then submitted a revised restitution figure of $90,431, the total of MBank's losses relating to petitioner's alleged theft and use of 21 cards from various MBank cardholders. Petitioner countered that the appropriate restitution figure should be $10,412, the losses MBank sustained as a result of all unauthorized uses of the Godfrey credit card identified in the count for which he was convicted.

The District Court ordered petitioner to make restitution to MBank in the amount of $90,431. *Id.*, at 78. Petitioner moved to reduce and correct his sentence under Federal Rule of Criminal Procedure 35, arguing that the District Court had exceeded its authority in ordering restitution for offenses other than the offense of conviction. The District Court denied the motion. *Id.*, at 82–85. The Court of Appeals for the Fifth Circuit affirmed, holding that "VWPA permits a

court to require restitution beyond that amount involved in the offense of conviction when there is a significant connection between the crime of conviction and similar actions justifying restitution." 877 F. 2d 1256, 1264 (1989).

The courts of appeals have reached varying conclusions regarding a court's ability under VWPA to require an offender to pay restitution for acts other than those underlying the offense of conviction.[2] We granted certiorari to resolve this split in authority. 493 U. S. 1018 (1990).

II

A

As in all cases involving statutory interpretation, we look first to the language of the statute itself. *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 685 (1985). Title 18 U. S. C. § 3579(a)(1) (1982 ed., Supp. IV) provides that "a defendant

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[2] The Fifth Circuit's decision in this case follows the decisions of the Second and Tenth Circuits. See *United States* v. *Berrios*, 869 F. 2d 25, 32 (CA2 1989) (permitting court to order restitution for losses beyond those "specified in the charge on which the defendant is convicted where the victim of that offense also suffered other losses as a result of the defendant's related course of conduct"); *United States* v. *Duncan*, 870 F. 2d 1532, 1537 (CA10 1989) (permitting court to order restitution for "other criminal acts that had a significant connection to the act for which conviction was had"). The Sixth Circuit has held that a court may require a defendant to make restitution "to victims of the offense for which he was convicted." *United States* v. *Durham*, 755 F. 2d 511, 512 (1985). The Eleventh Circuit has held that "[t]he amount of restitution [under VWPA] may not exceed the actual losses flowing from the offense for which the defendant has been convicted." *United States* v. *Barnette*, 800 F. 2d 1558, 1571 (1986) (citing *United States* v. *Johnson*, 700 F. 2d 699, 701 (CA11 1983) (construing Federal Probation Act, 18 U. S. C. § 3651 (1982 ed.)). The Ninth Circuit has ruled that "in cases which involve a continuing scheme to defraud, 'it is within the power of the court to require restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea.'" *United States* v. *Pomazi*, 851 F. 2d 244, 250 (1988) (quoting *United States* v. *Davies*, 683 F. 2d 1052, 1055 (CA7 1982)).

convicted of an offense" may be ordered to "make restitution to any victim of such offense." Other subsections of § 3579 likewise link restitution to the offense of conviction. See § 3579(b)(1) (listing damages recoverable "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense"); § 3579(b)(2) (listing damages recoverable "in the case of an offense resulting in bodily injury to a victim"); § 3579(b)(3) (listing damages recoverable "in the case of an offense resulting in bodily injury [that] also results in the death of a victim"). As the Government concedes, Brief for United States 14, a straightforward reading of the provisions indicates that the referent of "such offense" and "an offense" is the offense of conviction. Given that the ordinary meaning of "restitution" is restoring someone to a position he occupied before a particular event, see, *e. g.*, Webster's Third New International Dictionary 1936 (1986); Black's Law Dictionary 1180 (5th ed. 1979), the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.

The Government argues, however, that § 3579 answers only the question of *who* may receive restitution and offers no guidance as to *how much* restitution a court may order the defendant to pay. In the Government's view, § 3579(a) indicates merely that to receive restitution, a victim must be a victim of the offense of conviction. Once such a victim is identified, the Government maintains, the amount of restitution is calculated in accordance with 18 U. S. C. § 3580(a) (1982 ed.), which provides:

> "The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the fi-

> nancial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."

Specifically, the Government contends that the catchall phrase of § 3580(a), which directs courts to consider "such other factors as the court deems appropriate," authorizes courts to include in their restitution calculus losses resulting from offenses other than the offense of conviction.

The Government's reading of §§ 3579 and 3580 is unconvincing. As an initial matter, the detailed substantive guidance regarding the calculation of restitution that is found in subsections (b)(1), (b)(2), and (b)(3) makes clear that § 3579[3]

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[3] Section 3579(b) provides in part:

"The [restitution] order may require that such defendant—

"(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

"(A) return the property to the owner of the property or someone designated by the owner; or

"(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

"(i) the value of the property on the date of the damage, loss, or destruction, or

"(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

"(2) in the case of an offense resulting in bodily injury to a victim—

"(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

"(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

"(C) reimburse the victim for income lost by such victim as a result of such offense;

"(3) in the case of an offense resulting in bodily injury [that] also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services . . . ."

does more than simply designate *who* is entitled to restitution under the Act; those provisions establish the *amount* of restitution that courts can award for various losses caused by the offense.

In addition, it would be anomalous to regard § 3580, which delineates "[p]rocedure[s] for issuing order[s] of restitution," rather than § 3579, which governs the court's authority to issue restitution orders, as fixing the substantive boundaries of such orders. The Government's argument ignores this Court's commitment to "giving effect to the meaning and placement of the words chosen by Congress." *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 645 (1990) (rejecting claim that Congress intended to limit private right of action under Migrant and Seasonal Agricultural Worker Protection Act, 29 U. S. C. § 1801 *et seq.*, in section other than "Enforcement Provisions" section in which Congress established private right of action).

More significantly, § 3580(a)'s catchall phrase does not reflect a congressional intent to include in the restitution calculus losses beyond those caused by the offense of conviction. Section 3580(a) sets forth the considerations for "determining whether to order restitution under section 3579 of this title and the amount of such restitution." The first such consideration is "the amount of loss sustained by any victim as a result of the offense." This language suggests persuasively that Congress intended restitution to be tied to the loss caused by the offense of conviction. Indeed, had Congress intended to permit a victim to recover for losses stemming from all conduct attributable to the defendant, including conduct unrelated to the offense of conviction, Congress would likely have chosen language other than "the offense," which refers without question to the offense of conviction. See *supra*, at 416.

The remaining considerations preceding the catchall phrase also are designed to limit, rather than to expand, the scope of any order of restitution. These factors—"the financial re-

sources of the defendant" and "the financial needs and earning ability of the defendant's dependents"—provide grounds for awarding *less* than full restitution under the statute. Congress plainly did not intend that wealthy defendants pay *more* in "restitution" than otherwise warranted because they have significant financial resources, nor did it intend a defendant's dependents to be forced to bear the burden of a restitution obligation because they have great "earning ability." In light of the principle of *ejusdem generis*—that a general statutory term should be understood in light of the specific terms that surround it—the catchall phrase should not be read to introduce into the restitution calculus losses that would expand a defendant's liability beyond the offense of conviction. Cf. *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 734 (1973) (holding that "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated"). Moreover, this reading of the catchall phrase harmonizes § 3580(a) with § 3579(a)(2), which states that "[i]f the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor." If a court chooses to award partial or no restitution in accordance with § 3579(a)(2), it must couch its refusal in terms of the criteria set forth in § 3580(a).[4]

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[4] Under the Government's construction of § 3580(a), a court that did not award restitution for acts beyond the offense of conviction would presumably be required to explain its refusal to do so under § 3579(a)(2). The requirement that a court explain its refusal to award full restitution is more consistent with a scheme that establishes a clearly discernable outer limit of restitutionary liability than with one that permits an open-ended inquiry into losses resulting from the "defendant's related course of conduct," *Berrios*, 869 F. 2d, at 32, or from "acts that had a significant connection to the act for which conviction was had," *Duncan*, 870 F. 2d, at 1537. Further, the open-ended approach to restitution advocated by the Government, taken with § 3579(a)(2)'s requirement that a court explain its refusal to award full restitution, would in some cases undermine the statute's goal of compensating victims. Section 3579(d) authorizes a court to decline to

Section 3580(a) hence confirms, rather than undermines, our conclusion that the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order. We reject as implausible the Government's contention that the "such other" language in § 3580(a)'s catchall phrase imports into the restitution provisions a wholly new substantive dimension not otherwise evident in the statute. Rather, the factors listed in § 3580(a), including the catchall factor, are intended to guide a court's discretion when it decides whether to award full or partial restitution under § 3579.

B

The Government endeavors to buttress its interpretation of the statute by invoking the expansive declaration of purpose accompanying VWPA, see, *e. g.*, § 2(b)(2), note following 18 U. S. C. § 1512 (one purpose of the Act is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims . . . without infringing on the constitutional rights of the defendant"), and by referring to portions of the legislative history that reflect Congress' goal of ensuring "that Federal crime victims receive the fullest possible restitution from criminal wrongdoers," 128 Cong. Rec. 27391 (1982) (remarks of Rep. Rodino).[5]

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award restitution altogether where "the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims." Determining the existence of, and resulting loss from, offenses other than the one supporting conviction will often be sufficiently difficult to implicate this provision.

[5] We need not decide whether further support for our reading of the statutory provisions can be gleaned from the legislative history of the amended version of § 3579(a). See n. 1, *supra*. We note, and the Government implicitly concedes, that whatever light the legislative history sheds on the issue is favorable to petitioner. See H. R. Rep. No. 99–334, p. 7 (1985) (citing H. R. Rep. No. 98–1017, p. 83, n. 43 (1984)) ("To order a defendant to make restitution to a victim of an offense for which the de-

The Government also emphasizes policy considerations that purportedly support court-ordered restitution for acts outside the offense of conviction. Without such authority, the Government insists, in many cases courts cannot compensate victims for the full losses they suffered as a result of a defendant's conduct. The potential for undercompensation is heightened by prosecutorial discretion in charging a defendant, the argument goes, because prosecutors often frame their indictments with a view to success at trial rather than to a victim's interest in full compensation. See, *e. g.*, *United States* v. *Hill*, 798 F. 2d 402, 405 (CA10 1986). Finally, the Government maintains that the extensive practice of plea bargaining would, as a practical matter, wholly undermine victims' ability to recover fully for their losses because prosecutors often drop charges of which a defendant may be guilty in exchange for a plea to one or more of the other charges. See, *e. g.*, *United States* v. *Berrios*, 869 F. 2d 25, 30 (CA2 1989).

These concerns are not insignificant ones, but neither are they unique to the issue of victim compensation. If a prosecutor chooses to charge fewer than the maximum possible number of crimes, the potential recovery of victims of crime is undoubtedly limited, but so too is the potential sentence that may be imposed on a defendant. And although a plea agreement does operate to limit the acts for which a court may order the defendant to pay restitution, it also *ensures* that restitution will be ordered as to the count or counts to which the defendant pleads guilty pursuant to the agreement. The essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses. Nothing in the statute suggests that Congress intended to exempt victims of crime from the effects of such a bargaining process.

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fendant was not convicted would be to deprive the defendant of property without due process of law").

C

In any event, we need not resolve the policy questions surrounding VWPA's offense-of-conviction limitation on restitution orders. Even were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson* v. *United States*, 435 U. S. 6, 14–15 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. See *Crandon* v. *United States*, 494 U. S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text").

III

The plain language of VWPA makes clear that the District Court's restitution order in this case was unauthorized. Petitioner pleaded guilty only to the charge that he fraudulently used the credit card of Hershey Godfrey. Because the restitution order encompassed losses stemming from alleged fraudulent uses of cards issued to persons other than Godfrey, such portions of the order are invalid. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

NORTH DAKOTA ET AL. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–926. Argued October 31, 1989—Decided May 21, 1990

The United States and North Dakota exercise concurrent jurisdiction over two military bases on which the Department of Defense (DoD) operates clubs and package stores. In 1986, in order to reduce the price the military pays for alcoholic beverages sold on such bases, Congress passed a statute directing that distilled spirits be "procured from the most competitive source, price and other factors considered." A DoD regulation also requires that alcohol purchases be made in such a manner as to obtain "the most advantageous contract, price and other considered factors." Although the regulation promises cooperation with state officials, it denies any obligation to submit to state control or to make purchases from in-state or state-prescribed suppliers. Since long before 1986, North Dakota has maintained a liquor importation and distribution system, under which, *inter alia*, out-of-state distillers/suppliers may sell only to state-licensed wholesalers or federal enclaves, while licensed wholesalers may sell to licensed retailers, other licensed wholesalers, and federal enclaves. One state regulation requires that all persons bringing liquor into the State file monthly reports, and another requires that out-of-state distillers selling directly to a federal enclave affix a label to each individual item indicating that the liquor is for consumption only within the enclave. After a number of out-of-state distillers and importers informed military officials that they would not deal with, or would increase prices to, the North Dakota bases because of the burden of complying with the two state regulations, the Government filed suit in the District Court seeking declaratory and injunctive relief against the regulations' application to liquor destined for federal enclaves. The court granted the State's motion for summary judgment, reasoning that there was no conflict between the state and federal regulations because the state regulations did not prevent the Government from obtaining beverages at the "lowest cost." The Court of Appeals reversed, holding that the state regulations impermissibly made out-of-state distillers less competitive with local wholesalers.

Held: The judgment is reversed.

856 F. 2d 1107, reversed.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded that the state regulations are not invalid under the Supremacy Clause. Pp. 430–444.

(a) Under § 2 of the Twenty-first Amendment—which prohibits the transportation or importation of intoxicating liquor into a State for delivery or use therein in violation of state law—a State has no power to pass regulations that burden the Federal Government in an area or over a transaction that falls outside the State's jurisdiction, see, *e. g.*, *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, but has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system within the State's jurisdiction, see *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 110. Since North Dakota's labeling and reporting regulations fall within the core of the State's power to regulate distribution under the Twenty-first Amendment and unquestionably serve a valid state interest in prohibiting the diversion of liquor from military bases into the civilian market, they are supported by a strong presumption of validity and should not be lightly set aside, see, *e. g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 714. Pp. 430–433.

(b) The regulations do not violate the intergovernmental immunity doctrine. Although they may indirectly affect the Federal Government's liquor costs, they do not regulate the Government directly, since they operate only against suppliers. See, *e. g.*, *Helvering* v. *Gerhardt*, 304 U. S. 405, 422. Nor do they discriminate against the Government or those with whom it deals, since the regulatory regime of which they are a part actually favors the Government. All other liquor retailers in the State are required to purchase from state-licensed wholesalers, whereas the Government alone has the *option* either to do so or to purchase from out-of-state wholesalers who have complied with the labeling and reporting requirements. Thus, the regulatory system does not discriminate with regard to the economic burdens that result from it. See *Washington* v. *United States*, 460 U. S. 536, 544–545. Pp. 434–439.

(c) Congress has not here spoken with sufficient clarity to pre-empt North Dakota's attempt to protect its liquor distribution system. The language of the federal procurement statutes does not expressly pre-empt the state reporting and labeling regulations or address the problem of unlawful diversion. The state regulations do not directly prevent the Government from obtaining covered liquor "from the most competitive source, price and other factors considered," but merely raise the price charged by the most competitive source, out-of-state shippers. Pp. 439–441.

(d) The state reporting and labeling requirements are not pre-empted by the DoD regulation. That regulation does not purport to carry a greater pre-emptive power than the federal statutes. Nor does the regulation's text purport to pre-empt any such laws. Its command to the military to consider various factors in determining "the most advan-

tageous contract, price and other considered factors" cannot be understood to pre-empt state laws that merely have the incidental effect of raising costs for the military. Although the regulation does admonish that military cooperation with local authorities should not be construed as admitting an obligation to submit to state control or to buy from in-state or state-prescribed suppliers, the North Dakota regulations do not require such actions. Pp. 442–443.

(e) The present record does not establish the precise burdens the reporting and labeling laws will impose on the Government, but there is no evidence that they will be substantial. It is for Congress, not this Court, to decide whether the federal interest in procuring the most inexpensive liquor outweighs the State's legitimate interest in preventing diversion. It would be an unwise and unwarranted extension of the intergovernmental immunity doctrine for the Court to hold that the burdens associated with the regulations—no matter how trivial—are sufficient to make them unconstitutional. Pp. 443–444.

JUSTICE SCALIA, although agreeing that the availability to the Government of the option of buying liquor from in-state distributors saves the labeling regulation from invalidity, concluded that it does so not because the Government is thereby relieved of the burden of having to pay higher prices than anyone else, but only because that option is *not* a course of action that the Government has a constitutional right to avoid. The Twenty-first Amendment is binding on the Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler. Since letting the Government choose between purchasing label-free bottles from such wholesalers and purchasing labeled bottles from out-of-state distillers provides the Government with greater rather than lesser prerogatives than those enjoyed by other liquor retailers, the labeling requirement does not discriminate against the United States and thus does not violate any federal immunity. Pp. 444–448.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY, agreed that North Dakota's reporting regulation is lawful. Pp. 448, 465, n. 10.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 444. BRENNAN, J., filed an opinion concurring in the judgment in part and dissenting in part, in which MARSHALL, BLACKMUN, and KENNEDY, JJ., joined, *post*, p. 448.

Nicholas J. Spaeth, Attorney General of North Dakota, argued the cause for appellants. With him on the brief were *Steven E. Noack* and *Laurie J. Loveland*, Assistant Attorneys General.

Michael R. Lazerwitz argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Peterson*, *Deputy Solicitor General Wallace*, and *Richard Farber*.*

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join.

The United States and the State of North Dakota exercise concurrent jurisdiction over the Grand Forks Air Force Base and the Minot Air Force Base. Each sovereign has its own separate regulatory objectives with respect to the area over which it has authority. The Department of Defense (DoD), which operates clubs and package stores located on those bases, has sought to reduce the price that it pays for alcoholic beverages sold on the bases by instituting a system of competitive bidding. The State, which has established a liquor distribution system in order to promote temperance and ensure orderly market conditions, wishes to protect the integrity of that system by requiring out-of-state shippers to file monthly reports and to affix a label to each bottle of liquor sold to a federal enclave for domestic consumption. The clash between the State's interest in preventing the diversion of liquor and the federal interest in obtaining the lowest possible price forms the basis for the Federal Government's Supremacy Clause and pre-emption challenges to the North Dakota regulations.

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*Briefs of *amici curiae* urging reversal were filed for the National Alcoholic Beverage Control Association et al. by *James M. Goldberg;* for the National Beer Wholesalers' Association, Inc., by *Ernest Gellhorn* and *Erwin N. Griswold;* and for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Beate Bloch*, and *Barry Friedman*.

I

The United States sells alcoholic beverages to military personnel and their families at clubs and package stores on its military bases. The military uses revenue from these sales to support a morale, welfare, and recreation program for personnel and their families. See 32 CFR § 261.3 (1989); DoD Directive 1015.1 (Aug. 19, 1981). Before December 1985, no federal statute governed the purchase of liquor for these establishments. From December 19, 1985, to October 19, 1986, federal law required military bases to purchase alcoholic beverages only within their home State. See Pub. L. 99–190, § 8099, 99 Stat. 1219. Effective October 30, 1986, Congress eliminated the requirement that the military purchase liquor from within the State and directed that distilled spirits be "procured from the most competitive source, price and other factors considered." Pub. L. 99–661, § 313, 100 Stat. 3853, 10 U. S. C. § 2488(a).[1]

In accordance with this statute, the DoD has developed a joint-military purchasing program to buy liquor in bulk directly from the Nation's primary distributors who offer the lowest possible prices. Purchases are made pursuant to a DoD regulation which provides:

> "'The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall co-

[1] Congress kept the rule requiring in-state purchases of distilled spirits for installations in Hawaii and Alaska and of beer and wine for installations throughout the United States. Act of Oct. 30, 1986, Pub. L. 99–591, § 9090, 100 Stat. 3341–116.

> operation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.'" 32 CFR § 261.4 (1989).

Since long before the enactment of the most recent procurement statute, the State of North Dakota has regulated the importation and distribution of alcoholic beverages within its borders. See N. D. Cent. Code ch. 5 (1987 and Supp. 1989). Under the State's regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers or federal enclaves. N. D. Admin. Code § 84-02-01-05(2) (1986). Licensed wholesalers, in turn, may sell to licensed retailers, other licensed wholesalers, and federal enclaves. N. D. Cent. Code § 5-03-01 (1987). Taxes are imposed at both levels of distribution. N. D. Cent. Code § 5-03-07 (1987); N. D. Cent. Code ch. 57-39.2 (Supp. 1989). In order to monitor the importation of liquor, the State since 1978 has required all persons bringing liquor into the State to file monthly reports documenting the volume of liquor they have imported. The reporting regulation provides:

> "All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calender month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month." N. D. Admin. Code § 84-02-01-05(1) (1986).

Since 1986, the State has also required out-of-state distillers who sell liquor directly to a federal enclave to affix labels to each individual item, indicating that the liquor is for domestic consumption only within the federal enclave. The labels may be purchased from the state treasurer for a small sum or printed by the distillers/suppliers themselves accord-

ing to a state-approved format. App. 34. The labeling regulation provides:

> "All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed by the state treasurer." N. D. Admin. Code § 84–02–01–05(7) (1986).

Within the State of North Dakota, the United States operates two military bases: Grand Forks Air Force Base and Minot Air Force Base. The State and Federal Government exercise concurrent jurisdiction over both.[2] Shortly after the effective date of the procurement statute permitting the military to make purchases from out of state, the state treasurer conducted a meeting with out-of-state suppliers to explain the labeling and reporting requirements. App. 34. Five out-of-state distillers and importers thereupon informed federal military procurement officials that they would not ship liquor to the North Dakota bases because of the burden of complying with the North Dakota regulations.[3] A sixth supplier, Kobrand Importers, Inc., increased its prices from between $0.85 and $20.50 per case to reflect the cost of labeling and reporting.

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[2] The parties stipulated to concurrent jurisdiction but offered no further information. App. 16. A territory under concurrent jurisdiction is generally subject to the plenary authority of both the Federal Government and the State for the purposes of the regulation of liquor as well as the exercise of other police powers. See, *e. g.*, *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363, 379–380 (1973); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141–142 (1937); *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650–651 (1930). The parties have not argued that North Dakota ceded its authority to regulate the importation of liquor destined for federal bases.

[3] The five are Heublein, Inc., James B. Beam, Joseph Seagram & Sons, Inc., Somerset Importers, and Hiram Walker & Sons, Inc. App. 26.

The United States instituted this action in the United States District Court for the District of North Dakota seeking declaratory and injunctive relief against the application of the State's regulations to liquor destined for federal enclaves. The District Court denied the United States' cross-motion for summary judgment and granted the State's motion. The court reasoned that there was no conflict between the state and federal regulations because the state regulations did not prevent the Government from obtaining beverages at the "lowest cost." 675 F. Supp. 555, 557 (1987). A divided United States Court of Appeals for the Eighth Circuit reversed. 856 F. 2d 1107 (1988). While recognizing that "nothing in the record compels us to believe that the regulations are a pretext to require in-state purchases," *id.*, at 1113, the majority held that the regulations impermissibly made out-of-state distillers less competitive with local wholesalers. *Ibid.* Chief Judge Lay argued in dissent that the effect on the Federal Government was a permissible incident of regulations passed pursuant to the State's powers under the Twenty-first Amendment. *Id.*, at 1115–1116. We noted probable jurisdiction, 489 U. S. 1095 (1989), and now reverse.

II

The Court has considered the power of the States to pass liquor control regulations that burden the Federal Government in four cases since the ratification of the Twenty-first Amendment.[4] See *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964); *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363 (1973) *(Mississippi Tax Comm'n I); United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599 (1975) *(Mississippi Tax Comm'n II);* see also *Johnson* v.

[4] Section 2 of the Twenty-first Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Yellow Cab Transit Co., 321 U. S. 383 (1944). In each of those cases, we concluded that the State has no authority to regulate in an area or over a transaction that fell outside of its jurisdiction. In *Collins*, we held that the Twenty-first Amendment did not give the States the power to regulate the use of alcohol within a national park over which the Federal Government had exclusive jurisdiction. In *Hostetter*, we held that the Twenty-first Amendment conferred no authority to license the sale of tax-free liquors at an airport for delivery to foreign destinations made under the supervision of the United States Bureau of Customs. *Mississippi Tax Comm'n I* held that the State had no authority to regulate a transaction between an out-of-state liquor supplier and a federal military base within the exclusive federal jurisdiction. And, in *Mississippi Tax Comm'n II*, we held that the State has no authority to tax directly a federal instrumentality on an enclave over which the United States exercised concurrent jurisdiction.

At the same time, however, within the area of its jurisdiction, the State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 110 (1980); see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 712 (1984); *California Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936). The Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets. In *Hostetter*, we stated that our decision in *Collins*, striking down the California Alcoholic Beverage Control Act as applied to an exclusive federal reservation, might have been otherwise if "California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, in the interest of pre-

venting unlawful diversion into her territory." 377 U. S., at 333. We found that the state licensing law there under attack was unlawful because New York "ha[d] not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386." *Id.*, at 333–334.

In *Mississippi Tax Comm'n I*, *supra*, after holding that the State could not impose its normal markup on sales to the military bases, we added that "a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State.'" 412 U. S., at 377–378 (citations omitted).

The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. See *Carter* v. *Virginia*, 321 U. S. 131 (1944); *California Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936). The requirements that an out-of-state supplier which transports liquor into the State affix a label to each bottle of liquor destined for delivery to a federal enclave and that it report the volume of liquor it has transported are necessary components of the regulatory regime. Because liquor sold at Grand Forks and Minot Air Force Bases has been purchased directly from out-of-state suppliers, neither the markup nor the state taxes paid by liquor wholesalers and retailers in North Dakota is reflected in the military purchase price. Moreover, the federal enclaves are not governed by

state laws with respect to the sale of intoxicants; the military establishes the type of liquor it sells, the minimum age of buyers, and the days and times its package stores will be open. The risk of diversion into the retail market and disruption of the liquor distribution system is thus both substantial and real.[5] It is necessary for the State to record the volume of liquor shipped into the State and to identify those products which have not been distributed through the State's liquor distribution system. The labeling and reporting requirements unquestionably serve valid state interests.[6] Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly. See, *e. g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S., at 714.

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[5] A member of the National Conference of State Liquor Administrators executed an affidavit describing the following types of misconduct that North Dakota liquor regulations are intended to prevent:

"a. Diversion of alcohol off a federal enclave in Hawaii by a dependent of a Department of Defense employee in quantities large enough to supply the dependent's own liquor store in the private sector.

"b. Loss of quantities of alcohol from the time the supplier delivered the product to the Department of Defense personnel to the time when the product was to be inventoried or taken by Department of Defense personnel to another facility.

"c. Purchases of alcohol is *[sic]* quantities so large that the only logical explanation is that the alcohol was diverted from the military base into a state's stream of commerce. This occurred in the state of Washington as documented by the Washington State Liquor Control Board's February 20, 1987, letter to Mr. Chapman Cox, Assistant Secretary of Defense at the Pentagon in Washington, D. C. A copy of that letter is attached hereto as Attachment 1. The Washington State Liquor Control Board letter describes purchases of alcohol in quantities so large that on-base personnel would have had to individually consume 85 cases each during the fiscal year 1986. This amounts to 1,020 bottles or approximately 5 bottles per person per day, including Sundays and holidays." App. 36.

[6] Cf. *Rice* v. *Rehner*, 463 U. S. 713, 724 (1983) ("The State has an unquestionable interest in the liquor traffic that occurs within its borders").

III

State law may run afoul of the Supremacy Clause in two distinct ways: The law may regulate the Government directly or discriminate against it, see *McCulloch* v. *Maryland*, 4 Wheat. 316, 425–437 (1819), or it may conflict with an affirmative command of Congress. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824); see also *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 712–713 (1985). The Federal Government's attack on the regulations is based on both grounds of invalidity.

The Government argues that the state provisions governing the distribution of liquor by out-of-state shippers "regulate" governmental actions and are therefore invalid directly under the Supremacy Clause. The argument is unavailing. State tax laws, licensing provisions, contract laws, or even "a statute or ordinance regulating the mode of turning at the corner of streets," *Johnson* v. *Maryland*, 254 U. S. 51, 56 (1920), no less than the reporting and labeling regulations at issue in this case, regulate federal activity in the sense that they make it more costly for the Government to do its business. At one time, the Court struck down many of these state regulations, see *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 222 (1928) (state tax on military contractor); *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842) (tax on federal employee); *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922) (tax on lease of federal property); *Weston* v. *City Council of Charleston*, 2 Pet. 449 (1829) (tax on federal bond), on the theory that they interfered with "the constitutional means which have been legislated by the government of the United States to carry into effect its powers." *Dobbins*, 16 Pet., at 449. Over 50 years ago, however, the Court decisively rejected the argument that any state regulation which indirectly regulates the Federal Government's activity is unconstitutional, see *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), and that view has now been "thor-

oughly repudiated." *South Carolina* v. *Baker*, 485 U. S. 505, 520 (1988); see also *California Board of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 848 (1989); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 174 (1989).

The Court has more recently adopted a functional approach to claims of governmental immunity, accommodating of the full range of each sovereign's legislative authority and respectful of the primary role of Congress in resolving conflicts between the National and State Governments. See *United States* v. *County of Fresno*, 429 U. S. 452, 467–468 (1977); cf. *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U. S. 528 (1985). Whatever burdens are imposed on the Federal Government by a neutral state law regulating its suppliers "are but normal incidents of the organization within the same territory of two governments." *Helvering* v. *Gerhardt*, 304 U. S. 405, 422 (1938); see also *South Carolina* v. *Baker*, 485 U. S., at 520–521; *Penn Dairies, Inc.* v. *Milk Control Comm'n of Pennsylvania*, 318 U. S. 261, 271 (1943); *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 487 (1939). A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals. *South Carolina* v. *Baker*, 485 U. S., at 523; *County of Fresno*, 429 U. S., at 460. In addition, the question whether a state regulation discriminates against the Federal Government cannot be viewed in isolation. Rather, the entire regulatory system should be analyzed to determine whether it is discriminatory "with regard to the economic burdens that result." *Washington* v. *United States*, 460 U. S. 536, 544 (1983). Claims to any further degree of immunity must be resolved under principles of congressional pre-emption. See, *e. g.*, *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S., at 271; *James* v. *Dravo Contracting Co.*, 302 U. S., at 161.[7]

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[7] Thus, for example, in *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958), we put to one side "cases where, absent a conflicting federal regulation, a State seeks to impose safety or other require-

Application of these principles to the North Dakota regulations demonstrates that they do not violate the intergovernmental immunity doctrine. There is no claim in this case, nor could there be, that North Dakota regulates the Federal Government directly. See *United States* v. *New Mexico*,

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ments on a contractor who does business for the United States." *Id.*, at 543. We invalidated the state law because there was a clear conflict between the state policy of regulation of negotiated rates and the federal policy, expressed in statute and regulation, of negotiated rates. *Id.*, at 544. Similarly, in *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187 (1956), the state licensing law came into direct conflict with "the action which Congress and the Department of Defense ha[d] taken to insure the reliability of persons and companies contracting with the Federal Government." *Id.*, at 190. *Paul* v. *United States*, 371 U. S. 245 (1963), involved the Armed Services Procurement Act and regulations promulgated thereunder. We stated that the collision between the federal policy, expressed in these laws, and the state policy was "clear and acute." *Id.*, at 253. In *United States* v. *Georgia Public Service Comm'n*, 371 U. S. 285 (1963), we relied upon the passage by Congress of the Federal Property and Administrative Services Act, which spoke too clearly to permit any state regulation of competitive bidding or negotiation.

In discussing why it was proper to convene a three-judge court, the Court in *Georgia Public Service Comm'n* did state: "Direct conflict between a state law and federal constitutional provisions raises of course a question under the Supremacy Clause but one of broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law." *Id.*, at 287 (citing *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962)). That statement constituted an explanation for the assertion of jurisdiction, not an expression of a general principle of implied intergovernmental immunity. Under 28 U. S. C. § 2281 (1970 ed.), a three-judge court was required whenever a state statute was sought to be enjoined "upon the ground of the unconstitutionality of such statute"; *Kesler* held that such a court was required, and the Constitution was implicated, when the conflicting state and federal laws were clear. *Georgia Public Service Comm'n* raised a "broader" question because it could not "be resolved by the construction given either the state or the federal law." 371 U. S., at 287. In *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965), we overruled *Kesler* and explained that the variant of Supremacy Clause jurisprudence there discussed was that which is implicated when "a state measure conflicts with a federal requirement." 382 U. S., at 120.

455 U. S. 720 (1982); *Hancock* v. *Train*, 426 U. S. 167 (1976); *Mississippi Tax Comm'n II*, 421 U. S., at 608–610; *Mayo* v. *United States*, 319 U. S. 441, 447 (1943). Both the reporting requirement and the labeling regulation operate against suppliers, not the Government, and concerns about direct interference with the Federal Government, see *City of Detroit* v. *Murray Corp. of America*, 355 U. S. 489, 504–505 (1958) (opinion of Frankfurter, J.), therefore are not implicated. In this respect, the regulations cannot be distinguished from the price control regulations and taxes imposed on Government contractors that we have repeatedly upheld against constitutional challenge. See *United States* v. *City of Detroit*, 355 U. S. 466 (1958); *Penn Dairies, Inc.*, 318 U. S., at 279–280; *Alabama* v. *King & Boozer*, 314 U. S. 1, 8 (1941).[8]

Nor can it be said that the regulations discriminate against the Federal Government or those with whom it deals. The nondiscrimination rule finds its reason in the principle that the States may not directly obstruct the activities of the Fed-

[8] JUSTICE BRENNAN would strike down the labeling regulation because it subjects the military to special surcharges and forces it to pay higher in-state prices. *Post*, at 458. Yet, he would uphold the reporting requirement, whose costs are also a component of the out-of-state supplier's expenses, presumably on the grounds that there has been no showing that those costs have been passed on to the military. *Post*, at 464, n. 9. Whereas five companies stopped supplying the military after the labeling regulation went into effect and a sixth raised prices by as much as $20.50 per case, *post*, at 458, the Government introduced no evidence that the reporting regulation interfered with the military's policy of purchasing from the most competitive source. *Post*, at 464, n. 9. JUSTICE BRENNAN's test contains no standard by which "burdensomeness" may be measured. Would a state regulation that forced one company to stop dealing with the Government be invalid? What about a regulation that raised prices to the military, not by $20.50, but by $5 a case? We prefer to rely upon our traditional standard of "burden"—that specified by Congress and, in its absence, that which exceeds the burden imposed on other comparably situated citizens of the State—and decline to embark on an approach that would either result in the invalidation or the trial, by some undisclosed standard, of every state regulation that in any way touched federal activity.

eral Government. *McCulloch* v. *Maryland*, 4 Wheat., at 425–437.[9] Since a regulation imposed on one who deals with the Government has as much potential to obstruct governmental functions as a regulation imposed on the Government itself, the Court has required that the regulation be one that is imposed on some basis unrelated to the object's status as a Government contractor or supplier, that is, that it be imposed equally on other similarly situated constituents of the State. See, *e. g.*, *United States* v. *County of Fresno*, 429 U. S., at 462–464. Moreover, in analyzing the constitutionality of a state law, it is not appropriate to look to the most narrow provision addressing the Government or those with whom it deals. A state provision that appears to treat the Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory. We have held that "[t]he State does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them." *Washington* v. *United States*, 460 U. S., at 544–545.[10]

The North Dakota liquor control regulations, the regulatory regime of which the Government complains, do not disfavor the Federal Government but actually favor it. The

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[9] "The danger of hindrance of the Federal Government in the use of its property, resulting in erosion of the fundamental command of the Supremacy Clause, is at its greatest when the State may, through regulation or taxation, move directly against the activities of the Government." *City of Detroit* v. *Murray Corp. of America*, 355 U. S. 489, 504 (1958) (opinion of Frankfurter, J.).

[10] In our opinion in *Washington* v. *United States*, we made the following comment on our holding in *United States* v. *County of Fresno*, 429 U. S. 452 (1977):

"We rejected the United States' contention that the tax system discriminated against lessees of federal property. Because the economic burden of a tax imposed on the owner of nonexempt property is ordinarily passed on to the lessee, we explained that those who leased property from the Federal Government were no worse off than their counterparts in the private sector. 429 U. S., at 464–465." 460 U. S., at 543.

labeling and reporting regulations are components of an extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue. The system applies to all liquor retailers in the State. In this system, the Federal Government is favored over all those who sell liquor in the State. All other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with the State's liquor distribution system. N. D. Cent. Code § 5–03–01.1 (1987). The Government has the option, like the civilian retailers in the State, to purchase liquor from licensed wholesalers. However, alone among retailers in the State, the Government also has the *option* to purchase liquor from out-of-state wholesalers if those wholesalers comply with the labeling and reporting regulations. The system does not discriminate "with regard to the economic burdens that result." *Washington*, 460 U. S., at 544. A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it.

IV

The conclusion that the labeling regulation does not violate the intergovernmental immunity doctrine does not end the inquiry into whether the regulation impermissibly interferes with federal activities. Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone, see, *e. g.*, *United States* v. *New Mexico*, 455 U. S., at 737–738; *Penn Dairies, Inc.*, 318 U. S., at 275, even when the state regulation is enacted pursuant to the State's powers under the Twenty-first Amendment. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S., at 713. But when the Court is asked to set aside a regulation at the core of the State's powers under the Twenty-first Amendment, as when it is asked to recognize an implied exemption from state taxation, see *Rockford Life*

Ins. Co. v. *Illinois Dept. of Revenue*, 482 U. S. 182, 191 (1987), it must proceed with particular care. *Capital Cities Cable*, 467 U. S., at 714. Congress has not here spoken with sufficient clarity to pre-empt North Dakota's attempt to protect its liquor distribution system.

The Government's claim that the regulations are pre-empted rests upon a federal statute and federal regulation. The federal statute is 10 U. S. C. § 2488, which governs the procurement of alcoholic beverages by nonappropriated fund instrumentalities. It provides simply that purchases of alcoholic beverages for resale on military installations "shall be made from the most competitive source, price and other factors considered," § 2488(a)(1), but that malt beverages and wine shall be purchased from sources within the State in which the installation is located. It may be inferred from the latter provision as well as from the provision, elsewhere in the Code, that alcoholic beverages purchased for resale in Alaska and Hawaii must be purchased in state, Act of Oct. 30, 1986, Pub. L. 99–591, § 9090, 100 Stat. 3341–116, that Congress intended for the military to be free in the other 48 States to purchase liquor from out-of-state wholesalers. It follows that the States may not directly restrict the military from purchasing liquor out of state. That is the central lesson of our decisions in *Paul* v. *United States*, 371 U. S. 245 (1963); *United States* v. *Georgia Public Service Comm'n*, 371 U. S. 285 (1963); *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958); and *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187 (1956), in which we invalidated state regulations that prohibited what federal law required. We stated in *Paul* that there was a "collision . . . clear and acute," between the federal law which required competitive bidding among suppliers and the state law which directly limited the extent to which suppliers could compete. 371 U. S., at 253.

It is one thing, however, to say that the State may not pass regulations which directly obstruct federal law; it is quite

another to say that they cannot pass regulations which incidentally raise the costs to the military. Any number of state laws may make it more costly for the military to purchase liquor. As Chief Judge Lay observed in dissent, "[c]ompliance with regulations regarding the importation of raw materials, general operations of the distillery or brewery, treatment of employees, bottling, and shipping necessarily increase the cost of liquor." 856 F. 2d, at 1116. Highway tax laws and safety laws may make it more costly for the military to purchase from out-of-state shippers.

The language used in the 1986 procurement statute does not expressly pre-empt any of these state regulations or address the problem of unlawful diversion of liquor from military bases into the civilian market. It simply states that covered alcoholic beverages shall be obtained from the most competitive source, price and other factors considered. As the District Court observed, however, "'[l]owest cost' is a relative term." 675 F. Supp., at 557. The fact that the reporting and labeling regulations, like safety laws or minimum wage laws, increase the costs for out-of-state shippers does not prevent the Government from obtaining liquor at the most competitive price, but simply raises that price. The procurement statute does not cut such a wide swath through state law as to invalidate the reporting and labeling regulations.

In this case the most competitive source for alcoholic beverages are out-of-state distributors whose prices are lower than those charged by North Dakota wholesalers regardless of whether the labeling and reporting requirements are enforced. The North Dakota regulations, which do not restrict the parties from whom the Government may purchase liquor or its ability to engage in competitive bidding, but at worst raise the costs of selling to the military for certain shippers, do not directly conflict with the federal statute.

V

The DoD regulation restates, in slightly different language,[11] the statutory requirement that distilled spirits be "procured from the most competitive source, price and other factors considered," but it does not purport to carry a greater pre-emptive power than the statutory command itself. It is Congress—not the DoD—that has the power to pre-empt otherwise valid state laws, and there is no language in the relevant statute that either pre-empts state liquor distribution laws or delegates to the DoD the power to pre-empt such state laws.[12]

Nor does the text of the DoD regulation itself purport to pre-empt any state laws. See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 583 (1987); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S., at 717–718. It directs the military to consider various factors in determining "the most advantageous contract, price and other considered factors," but that command cannot be understood to pre-empt state laws that have the incidental effect of raising costs for the military. Indeed, the regulation specifically envisions some regulation by state law, for it provides that the Department "shall cooperate with local [and] state . . . officials . . . to the degree that their duties relate to the provisions of this chapter." The regulation

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[11] See *supra*, at 427–428. The fact that this regulation was promulgated in 1982 makes it rather clear that it was not intended to address the problem of labeling or reporting regulations or otherwise to enlarge the authority to make out-of-state purchases as permitted by the 1986 statute.

[12] The statute pursuant to which the DoD regulation was promulgated does not even speak to the purchase of liquor by the military. It provides in part:

"The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces . . . at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces . . . ." 65 Stat. 88, 50 U. S. C. App. § 473 (1982 ed.).

does admonish that such cooperation should not be construed as an admission that the military is obligated to submit to state control or required to buy from suppliers located within the State or prescribed by the State. The North Dakota regulations, however, do not require the military to submit to state control or to purchase alcoholic beverage from suppliers within the State or prescribed by the State. The DoD regulation has nothing to say about labeling or reporting by out-of-state suppliers.

When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle. But in questions relating to the allocation of power between the Federal and State Governments on civilian commercial issues, we heed the command of Congress without any special deference to the military's interpretation of that command.

The present record does not establish the precise burdens the reporting and labeling regulations will impose on the Government, but there is no evidence that they will be substantial. The reporting requirement has been in effect since 1978 and there is no evidence that it has caused any supplier to raise its costs or stop supplying the military. Although the labeling regulation has caused a few suppliers either to adjust their prices or to cease direct shipments to the bases, there has been no showing that there are not other suppliers willing to enter the market and there is no indication that the Government has made any attempt to secure other out-of-state suppliers. The cost of the labels is approximately three to five cents if purchased from the state treasurer, and the distillers have the right to print their own labels if they prefer. App. 34. Even in the initial stage of enforcing the requirement for the two bases in North Dakota, various distillers and suppliers have already notified the state treasurer that they intend to comply with the new regulations. *Ibid.*

And, even if its worst predictions are fulfilled, the military will still be the most favored customer in the State.

It is Congress, not this Court, which is best situated to evaluate whether the federal interest in procuring the most inexpensive liquor outweighs the State's legitimate interest in preventing diversion. Congress has already effected a compromise by excluding beer and wine and the States of Hawaii and Alaska from the 1986 statute. It may also decide to prohibit labels entirely or prescribe their use on a nationwide basis. It would be both an unwise and an unwarranted extension of the intergovernmental immunity doctrine for this Court to hold that the burdens associated with the labeling and reporting requirements—no matter how trivial they may prove to be—are sufficient to make them unconstitutional. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

All agree in this case that state taxes or regulations that discriminate against the Federal Government or those with whom it deals are invalid under the doctrine of intergovernmental immunity. See *ante*, at 435 (opinion of STEVENS, J.); *post*, at 451–452 (opinion of BRENNAN, J.); *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 398 (1983). The principal point of contention is whether North Dakota's labeling requirement produces such discrimination. I agree with JUSTICE STEVENS that it does not, because the Federal Government can readily avoid that discrimination against its contractors by purchasing its liquor from in-state distributors, as everyone else in North Dakota must do. I disagree with JUSTICE STEVENS, however, as to *why* the availability of this option saves the regulation.

If I understand JUSTICE STEVENS correctly, the availability of the option suffices, in his view, whether or not North Dakota would have the power to prevent the Federal Government from purchasing liquor directly from out-of-state

suppliers. So long as the Federal Government does not *have* to pay more tax than North Dakota citizens in order to obtain liquor, the principle of governmental immunity is not offended. For this proposition JUSTICE STEVENS relies on *Washington* v. *United States*, 460 U. S. 536 (1983), in which we upheld a state scheme for taxing building materials in which the Federal Government's business partners paid a tax other market participants did not. There the State normally imposed a tax upon the landowner for the purchase of construction materials. Since it could not constitutionally do so where the Federal Government was the landowner, it imposed the tax instead upon the building contractor, though at a lower rate than the tax applicable to landowners. We upheld the contractor tax on the ground that the net result accorded the Federal Government treatment no worse than that received by its private-sector counterparts; at worst, it would have to reimburse its contractors for the tax paid, in which event (because of the lower rate for the contractor tax) it would still be better off than the private landowner. *Id.*, at 542.

As an original matter I am not sure I would have agreed with the approach we took in *Washington*, for reasons of both principle and practicality. As a matter of principle, if (as we recognized in *Washington*) the Federal Government has a constitutional entitlement to its immunity from direct state taxation, then it seems to me the State cannot require it to "pay" for that entitlement by bearing the burden of an indirect tax directed at it alone. And as a matter of practicality, a jurisdictional issue (the jurisdiction to tax) should not turn upon a factor that is, as a general matter, so difficult to calculate as the Federal Government's "net" position. But today's case is in any event distinguishable from *Washington* in that the difficulty of calculation is not only an accurate general prediction but a reality on the facts before us. Unlike in *Washington*, where the relative burdens placed on the Federal Government and its private-sector counterparts were easily

compared (one could simply look at the tax rates), North Dakota's labeling requirement cannot be directly measured against the taxes imposed on other participants in the State's liquor market. One might, with some difficulty, determine the cost of compliance with the labeling requirement and uphold the regulation if that cost is less than the taxes imposed upon nonfederal purchasers. But under that approach, the constitutionality of North Dakota's regulation might vary year to year as the cost of compliance (the cost of buying and affixing labels) fluctuates. I do not think *Washington* compels us to uphold a regulatory requirement uniquely imposed on federal contractors that is so different from the offsetting burden on private market participants as to require difficult and periodic computation of relative burden.

This problem of comparability of burden does not trouble JUSTICE STEVENS because, he says, the rule of *Washington* is satisfied in this case because the Federal Government is given the *option* of purchasing label-free liquor from in-state distributors, and thus (by definition) the *option* of not carrying a higher financial burden than anyone else. That approach carries *Washington* one step further (though I must admit a logical step further) down the line of analysis that troubled me about the case in the first place. *Washington* said (erroneously, in my view) that you can impose a discriminatory indirect tax, so long as it is no higher than the general direct tax which the Federal Government has a constitutional right to avoid. But if economic comparability is the touchstone, reasons JUSTICE STEVENS—that is, if everything is OK so long as the Federal Government pays no more taxes than anyone else—then it should follow that you can impose a discriminatory indirect tax that is even *greater* than the constitutionally avoided direct tax, so long as the Federal Government is given the *option* of paying the direct tax instead. I would not make that extension, however reasonable it may be. Suffering a discriminatory imposition in the precise amount of the constitutionally avoidable tax is not the same

in kind (though it may well be the same in effect) as suffering a discriminatory imposition in a higher amount with the option of escaping it by paying the constitutionally avoidable tax. If, therefore, in the present case, the State could not compel the Federal Government to purchase its liquor from in-state distributors, then I do not think it could force the Federal Government to choose between paying for a discriminatory labeling requirement and purchasing from in-state suppliers.

I ultimately agree with JUSTICE STEVENS, however, that the existence of the option in the present case saves the discriminatory regulation—but only because the option of buying liquor from in-state distributors (unlike the option of paying a direct tax in *Washington*) is *not* a course of action that the Federal Government has a constitutional right to avoid. The Twenty-first Amendment, which prohibits "the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof," is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion. In all but one of the cases in which we have invalidated state restrictions on liquor transactions between the Federal Government and its business partners, the liquor was found not to be for "delivery or use" in the State because its destination was an exclusive federal enclave. See *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363 (1973); *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938); cf. *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944). In the remaining case, *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599 (1975), we held that the State could not impose a sales tax, the legal incidence of which fell on the Federal Government, on liquor supplied to a federal military base under concurrent state-federal jurisdiction. That decision rested on the con-

clusion that the Twenty-first Amendment had not abolished the Federal Government's traditional immunity from state taxation. *Id.*, at 612–613. I do not believe one must also conclude that the Twenty-first Amendment did not abolish the Federal Government's immunity from state regulation. Federal immunity from state taxation, which has been a bedrock principle of our federal system since *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), is at least arguably consistent with the text of the Twenty-first Amendment's prohibition on transportation or importation in violation of state law. Federal immunity from state liquor import regulation is not.

That is not to say, of course, that the State may enact regulations that discriminate against the Federal Government. But for reasons already adverted to, the North Dakota regulations do not do so. In giving the Federal Government a choice between purchasing label-free bottles from in-state wholesalers or purchasing labeled bottles from out-of-state distillers, North Dakota provides an option that no other retailer in the State enjoys. That being so, the labeling requirement for liquor destined for sale or use on nonexclusive federal enclaves does not violate any federal immunity.

For these reasons, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE KENNEDY join, concurring in the judgment in part and dissenting in part.

I concur in the Court's judgment that North Dakota's reporting requirement is lawful, but cannot join the Court in upholding that State's labeling requirement. I cannot join the plurality because it underestimates the degree to which North Dakota's law interferes with federal operations and derogates the Federal Government's immunity from such interference, which is secured by the Supremacy Clause. I cannot join JUSTICE SCALIA because his approach is at odds with our decision in *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599 (1975) *(Mississippi Tax Comm'n II)*.

I

The labeling requirement imposed by North Dakota is not a trifling inconvenience necessary to the State's regulatory regime. An importer or distiller supplying the United States military bases in North Dakota must not only purchase or manufacture special labels and affix one to each bottle, it also must segregate and then track those bottles throughout the remainder of its manufacturing and distribution process. The special label requirement throws a wrench into the firm's entire production system. The cost of complying with the regulation, therefore, is far greater than the few pennies per label acknowledged by the plurality. See *ante*, at 428–429. Five of the Government's suppliers have declined to continue shipping to the military bases in North Dakota as a direct result. The five firms are the primary United States distributors for nine popular brands of liquor: Chivas Regal scotch, Johnnie Walker scotch, Tanqueray gin, Canadian Club whiskey, Courvoisier cognac, Jim Beam bourbon, Seagrams 7 Crown whiskey, Smirnoff vodka, and Jose Cuervo tequila. The U. S. importer of Beefeaters gin agreed to continue doing business, but only at a price increase of up to $20.50 per case. The suppliers of these brands potentially still available to fill the military's needs are either companies operating further down the distribution chain than these distillers and importers, who might be willing to undertake the onerous labeling requirement and duly charge the Government for their trouble, or North Dakota's own liquor wholesalers who are exempt from the requirement.

The labeling requirement, furthermore, cannot be considered "necessary" to the State's liquor regulatory regime by any definition of the term. The State could achieve the same result in its effort to "prevent the unlawful diversion of liquor into [its] regulated intrastate markets," *ante*, at 431, by instead requiring special labels on liquor shipped to in-state

wholesalers. Such labels would accomplish precisely the same goal—providing a means for state police to distinguish legal bottles from illegal ones—without interfering with federal operations. The State is also free to enforce its reporting requirement and take any other action that does not interfere with federal activities, including negotiating a mutual enforcement program with the military, which is itself governed by a regulation prohibiting the kind of diversion that the State seeks to control. See DoD Directive 1015.3-R, ch. 4(F)(3) (May 1982).[1]

That North Dakota's declared purpose for implementing the regulation is to discourage and police unlawful diversion of liquor into its domestic market does not prevent this Court from ruling on its constitutionality. To be sure, this Court has twice said that the States retain police power to regulate shipments of liquor through their territory "insofar as necessary to prevent" unlawful diversion in the absence of conflicting federal regulation. *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363, 377 (1973) *(Mississippi Tax Comm'n I);* see also *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 333–334 (1964). Such statements were indications that this Court believed that States are not rendered utterly powerless in this respect by the dormant Commerce Clause. We have never held, however, that any regulation with this avowed purpose is insulated from review under the federal immunity doctrine or any other constitutional ground, including the dormant Commerce Clause. Nor have we ever upheld such a regulation, or any state regulation of liquor that clashed with some federal law or operation, on the basis

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[1] The regulation provides:

"Diversion. Packaged alcoholic beverage sales outlets are operated solely for the benefit of authorized purchasers. Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements."

of a "presumption of validity." Cf. *ante*, at 433. Indeed, our previous, limited statements—that States are not prevented by the Commerce Clause from regulating shipments of liquor through their territory where necessary to prevent diversion—recognized that the regulations must be consistent with other constitutional requirements. See *Mississippi Tax Comm'n I*, *supra*, at 377 (recognizing such state power only "in the absence of conflicting federal regulation"). Since the States' power is limited by the doctrine of federal pre-emption, which flows from the Supremacy Clause, then that power must also be limited by the doctrine of federal immunity, which also flows from the Supremacy Clause.[2]

II

The plurality characterizes the doctrine of federal immunity as invalidating state laws only if they regulate the Federal Government directly or discriminate against the Government or those with whom it deals. See *ante*, at 435. As the plurality recognizes, "a regulation imposed on one who deals with the Government has as much potential to obstruct governmental functions as a regulation imposed on the Government itself." *Ante*, at 438. But contrary to the plurality's view, the rule to be distilled from our prior cases is that those dealing with the Federal Government enjoy immunity from

[2] The principle of federal immunity from state tax and other regulation was first discerned in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819) ("The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared") (invalidating a state tax that fell solely on notes issued by the Bank of the United States). Without such immunity, Chief Justice Marshall reasoned, any State held the power to defeat federal operations because "the power to tax involves the power to destroy," *id.*, at 431, and the Federal Government, unlike the State's citizens, has no voice in the state legislature with which to guard against abuse. *Id.*, at 428.

state control not only when a state law discriminates but also when a state law actually and substantially interferes with specific federal programs. See *United States* v. *New Mexico*, 455 U. S. 720, 735, n. 11 (1982) ("It remains true, of course, that state taxes are constitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities"). Cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161 (1937) (permitting application of a general state tax to federal contractors on the ground that it did not discriminate against them or "interfere in any substantial way with the performance of federal functions"). North Dakota's labeling regulation violates the Supremacy Clause under both standards. It substantially obstructs federal operations, and it discriminates against the Federal Government and its chosen business partners.

A

The plurality recognizes that we have consistently invalidated nondiscriminatory state regulations that interfere with affirmative federal policies, including those governing procurement, but designates these cases as resting on principles of pre-emption. See *ante*, at 435, and 435–436, n. 7. This characterization is not only at odds with the reasoning in the opinions themselves but suggests a rigid demarcation between the two Supremacy Clause doctrines of federal immunity and pre-emption which is not present in our cases. Whether a state regulation interferes with federal objectives is, of course, a central inquiry in our traditional pre-emption analysis. But when we have evaluated the validity of an obligation imposed by a State on the Federal Government and its business partners, we have justly considered whether the obligation interferes with federal operations as part of our federal immunity analysis.

In *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187 (1956), for example, we held that building contractors employed by the Federal Government were immune from a neutral Arkan-

sas regulation requiring contractors to obtain a state license, because the regulation would give the State "a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *Id.*, at 190. We found the following rationale applicable:

> "'It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders . . . .'" *Ibid.* (quoting *Johnson* v. *Maryland*, 254 U. S. 51, 57 (1920)).

The plurality's assertion that *Leslie Miller, Inc.*, was not decided on immunity grounds, see *ante*, at 436, n. 7, is inconsistent with that opinion's own analysis.

In *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958), we found unconstitutional a state provision requiring common carriers to receive state approval before offering free or reduced rate transportation to the United States. We distinguished our cases sustaining nondiscriminatory state taxes and found the regulation unconstitutional because it would have interfered with the Government's policy of negotiating rates. *Id.*, at 543–545. We explained that a decision in favor of California would have interfered with the activities of federal procurement officials and would have required the Federal Government either to pay higher rates or to conduct separate negotiations with the regulatory divisions of, potentially, each of the then-48 States. *Id.*, at 545–546.

Contrary to the plurality's contention, *ante*, at 435–436, n. 7, we concluded that the regulation was unconstitutional

not under pre-emption doctrine but because it "place[d] a prohibition on the Federal Government" as significant as the licensing requirements invalidated in *Leslie Miller, Inc.* v. *Arkansas*, *supra*, and *Johnson* v. *Maryland*, *supra*, both decided on federal immunity grounds. See *supra*, at 452–453. Moreover, we relied on the following passage from *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819), which elucidates the doctrine of federal immunity:

> "It is of the very essence of supremacy to remove all obstacles to [federal] action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

Furthermore, the Court's rationale in *Public Utilities Comm'n*—that a state regulation which obstructs federal operations is prohibited under the federal immunity doctrine—is not inconsistent with our decisions sustaining state taxes solely on the ground that they do not discriminate against the Government or its business partners. Indeed, we sustained such a nondiscriminatory state tax on federal contractors the same day that we decided *Public Utilities Comm'n*. See *United States* v. *City of Detroit*, 355 U. S. 466, 472 (1958) (upholding the application of a state tax to lessees of federal property).[3]

[3] The plurality relies on *South Carolina* v. *Baker*, 485 U. S. 505, 523 (1988), and *United States* v. *County of Fresno*, 429 U. S. 452, 460 (1977), for the proposition that a state regulation is invalid under the immunity doctrine *only* if it directly regulates the United States or is discriminatory. See *ante*, at 434–435. This extrapolates too much from the *City of Detroit* line of cases and ignores the *Public Utilities Comm'n of California* line. What *South Carolina* v. *Baker* and *County of Fresno* actually say is that *a state tax* is not invalid unless it is directly laid on the Federal Government or discriminatory. Both cases cite, in support of this proposition, *City of Detroit*, which itself cites the same rule: "[A] tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." 355 U. S., at 473. The Court's decision the same day, in *Public Utilities*

In the companion cases of *United States* v. *Georgia Public Service Comm'n*, 371 U. S. 285 (1963), and *Paul* v. *United States*, 371 U. S. 245 (1963), we invalidated two other neutral

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Comm'n of California, 355 U. S., at 544, that California's regulation of public carriers in their dealings with the Federal Government violated the federal immunity doctrine underscores that the language in *City of Detroit* and other tax cases was never intended to delineate the full scope of the doctrine. The California regulation could not have been characterized as discriminatory. Carriers were permitted to contract with the United States on the same terms as with any other customer; they were just required to obtain state permission before giving the Government special treatment. 355 U. S., at 537.

To be sure, state taxes and regulations are subject to the same restrictions under the federal immunity doctrine, see *Mayo* v. *United States*, 319 U. S. 441, 445 (1943). Regulations, however, present a wider range of possibilities for interference with federal activities than do taxes. The tax in *City of Detroit* did not interfere with the Federal Government's ability to lease property and therefore interference was not an issue that required discussion. In contrast, the regulation in *Public Utilities Comm'n of California* did interfere with the Federal Government's ability to choose "'the least costly means of transportation . . . which will meet military requirements,'" 355 U. S., at 542, and the issue was discussed.

As the Court said in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 484 (1939), a nondiscriminatory tax "could not be assumed to obstruct the function which [a government entity] had undertaken to perform." This is because "the purpose of the immunity was not to confer benefits on the employees [of the Federal Government] by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other." *Id.*, at 483–484 (footnote omitted). Therefore, we have upheld nondiscriminatory taxes imposed on those with whom the Federal Government deals because "'[i]t seems unreasonable to treat the absence of an exemption from taxes [for those with whom the Government deals] as a burden upon the normal exercise of a governmental function.'" See *California Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U. S. 844, 849, n. 4 (1989) (quoting favorably Judge Augustus Hand's explanation from *In re Leavy*, 85 F. 2d 25, 27 (CA2 1936)). And we have found in specific cases involving "a state tax that is general and nondiscriminatory" that "'[t]he tax does not place

state regulations because they interfered with the Federal Government's chosen mode of procurement.[4] In *Georgia Public Service Comm'n*, *supra*, at 292, we held that Georgia could not revoke the operating certificates of any moving

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a financial burden upon the United States; nor will it . . . render the [federal official's] task more difficult or cumbersome.'" *California Board of Equalization*, *supra*, at 850, n. 6 (quoting Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv. L. Rev. 1141, 1166–1169 (1942)). However, the fact that nondiscriminatory taxes have not been found to obstruct federal operations does not mean that nondiscriminatory regulations can be assumed to be equally harmless, as our cases make evident.

[4]These cases as well were decided on immunity grounds. The Court characterized both cases, decided the same day, as presenting the question "whether or not the state regulatory scheme burdened the exercise by the United States of its constitutional powers to maintain the Armed Services." *Paul*, 371 U. S., at 250. In addition, in *Paul*, the Court explained its invalidation of California's milk regulations, even as applied to purchases of milk for resale at federal commissaries, as follows: "These commissaries are 'arms of the Government deemed by it essential for the performance of governmental functions,' and 'partake of whatever immunities' the Armed Services 'may have under the Constitution and federal statutes.'" *Id.*, at 261 (citation omitted). In *Georgia Public Service Comm'n*, the Court relied on its earlier decision in *Public Utilities Comm'n of California*, *supra*, which decision was grounded in the *McCulloch* v. *Maryland* federal immunity doctrine. See 371 U. S., at 293.

Moreover, *Paul* recharacterized the decision in *Penn Dairies, Inc.* v. *Milk Control Comm'n of California*, 318 U. S. 261 (1943), which the plurality cites for the proposition that States may permissibly obstruct federal operations if they do so by means of neutral laws, see *ante*, at 435. In the *Paul* Court's view, *Penn Dairies* stood for the unremarkable proposition that when federal law expressly permits the Government to purchase supplies on the open market "'when the price [of such supplies] is fixed by federal, state, municipal or other competent legal authority'" and expressly manifested a "'hands off' policy respecting minimum price laws of the States," state minimum price laws may constitutionally be enforced against the Government's suppliers. 371 U. S., at 254–255. Revealingly, the plurality musters no support other than the no-longer-apposite *Penn Dairies* for its assertion that price control regulations aimed at government suppliers have repeatedly been upheld against constitutional challenge. See *ante*, at 437.

company for undertaking a mass intrastate shipment of household goods for the Federal Government at volume discount rates, although such rates violated Georgia law, because federal regulations required Government officers to secure the "'lowest over-all cost'" in purchasing transportation "through competitive bidding or negotiation." Similarly, in *Paul* v. *United States*, *supra*, we held that California minimum wholesale milk prices could not be enforced against sellers supplying United States military bases where federal regulations mandated "full and free competition" and selection of the "lowest responsible bidder" because the "California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States." *Id.*, at 252, 253.

North Dakota's labeling regulation would interfere with the military's ability to comply with affirmative federal policy in the same way as the regulations we invalidated in *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958); *United States* v. *Georgia Public Service Comm'n*, *supra*, and *Paul* v. *United States*, *supra*. As in those cases, the state regulation threatens to scuttle the Federal Government's express determination to secure products and services in the most competitive manner possible. Federal law requires military officials to purchase distilled spirits "from the most competitive source, price and other factors considered." 10 U. S. C. § 2488(a). In enacting this standard, Congress made a deliberate choice to permit, and generally encourage, the military to buy liquor for its bases outside the States in which they are located. The "competitive source" provision replaced an earlier statute requiring bases to purchase all alcoholic beverages in state. See Pub. L. 99–190, § 8099, 99 Stat. 1219. The statute's legislative history shows that Congress determined that the military should be free to purchase distilled spirits out of state from the most competitive source,

both to save money and to generate more funding for morale and welfare activities.[5]

For liquor, the most competitive sources are distillers and importers—companies operating at the top of the national distribution chain. It is not only plausible that such companies would find it more trouble than it was worth to comply with North Dakota's labeling requirement, five companies have already refused to fill orders for the North Dakota bases. At least one other firm has been willing to fill orders only at a substantially increased price. The regulation would force the military to lose some of the advantages of a highly competitive nationwide market, either because it would be subjected to special surcharges by out-of-state suppliers or forced to pay high in-state prices—or some combination of these. Moreover, the difficulties presented by North Dakota's labeling requirement would increase exponentially if additional States adopt equivalent rules, a consideration we found dispositive in *Public Utilities Comm'n of California*, *supra*, at 545–546. See also *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 398, n. 8 (1983) (rejecting the argu-

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[5] The Senate Armed Services Committee Report explained that it "included a provision mandating that purchases of such alcoholic beverages for resale be made in the most efficient and economic manner, without regard to the location of the source of the beverages, except as that location may affect cost . . . [because] the committee believes that procurement of alcoholic beverage[s] for resale should be subjected to the same favorable effects of competition as is useful in the procurement of other goods and services. Additionally, the committee does not believe it appropriate to impose upon the Department, or the morale and welfare activities of the Department, a requirement that will result in additional costs of tens of millions of dollars, caused by the imposition of indirect State taxation [o]n the Federal government and the lack of competition." S. Rep. No. 99–331, p. 283 (1986).

The Senate supported deletion of the in-state purchasing requirement for all alcoholic beverages, but the House prevailed in excepting beer and wine, on the ground that the military's overall alcohol procurement costs would not be unduly affected. H. R. Rep. No. 99–718, pp. 183–184 (1986); H. R. Conf. Rep. No. 99–1001, pp. 39, 464 (1986).

ment that a Tennessee bank tax that discriminated against federal obligations might be *de minimis* because if every State enacted comparable provisions, the Federal Government would sustain significantly higher borrowing costs).

The regulation also intrudes on federal procurement in a manner not unlike the licensing requirement we found unacceptable in *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187 (1956). Just as Arkansas' licensing regulation would have given that State a say as to which building contractor the Federal Government could hire, the North Dakota labeling requirement—by acting as a deterrent to contracting with the Federal Government—would prevent the Federal Government from making an unfettered choice among liquor suppliers. The military cannot effectively comply with Congress' command to purchase from "the most competitive source" when a number of the most competitive sources—distillers and importers—are driven out of the market by the State's regulation. Thus, North Dakota's labeling regulation "'does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders.'" *Leslie Miller, Inc.* v. *Arkansas*, *supra*, at 190 (quoting and applying *Johnson* v. *Maryland*, 254 U. S., at 57). Federal military procurement policies for distilled spirits, therefore, would be obstructed and, under this Court's federal immunity doctrine, the regulation should fall.[6]

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[6] Contrary to the plurality's assertion, I would find the labeling regulation invalid not because it "in any way touched federal activity," *ante*, at 437, n. 8, but because it obstructs an affirmative federal procurement policy specified by Congress (and also because it discriminates against the Federal Government and its suppliers). The plurality suggests that my recognition of this aspect of federal immunity doctrine will lead to a parade of horribles: Every state regulation will be potentially subject to challenge. *Ibid.* But this particular parade has long been braved by our court system, not only under the doctrine of federal immunity but also under the much broader doctrine of pre-emption. See *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) (explaining that state law is pre-empted whenever it

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Even if I agreed with the plurality that our federal immunity doctrine proscribes only those state laws that discriminate against the Federal Government or its business partners, however, I would still find North Dakota's labeling regulation invalid. North Dakota's labeling regulation plainly discriminates against the distillers and importers who supply the Federal Government because it is applicable only to "liquor destined for delivery to a federal enclave in North Dakota." N. D. Admin. Code § 84–02–01–05(7) (1986). A state control that makes the Federal Government or those with whom it deals worse off than "their counterparts in the private sector" is discriminatory. *Washington* v. *United States*, 460 U. S. 536, 543 (1983). "The appropriate question is whether [someone] who is considering working for the Federal Government is faced with a cost he would not have to bear if he were to do the same work for a private party." *Id.*, at 541, n. 4. An importer or distiller for a particular brand has two kinds of potential customers in North Dakota: military bases and North Dakota wholesalers. For any liquor it sells to the military, it is required to buy or manufacture and affix special labels. Then it must monitor separately the handful of cases destined for the two military bases in North Dakota during the rest of the company's manufacturing and shipping process, in order to ensure that only specially labeled bottles are sent to Grand Forks and Minot Air Force Bases. However, the same distiller could sell its product to a North Dakota liquor wholesaler without affixing

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"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) (explaining that state law is pre-empted where it produces a result inconsistent with the objective of a federal statute). A judiciary capable of discerning when federal objectives are *frustrated* under pre-emption doctrine and when interstate commerce is *burdened* under dormant Commerce Clause doctrine also may be relied on to determine when federal operations are *obstructed* under federal immunity doctrine.

special labels or reducing its economies of scale.[7] *Washington* v. *United States*, therefore, mandates a finding that the labeling requirement discriminates against those who deal with the Federal Government.[8]

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[7] Cf. *California Board of Equalization* v. *Sierra Summit, Inc.*, 490 U. S., at 849 (upholding the application of a use tax to a bankruptcy sale because "'[t]he purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else'") (quoting and applying *In re Leavy*, 85 F. 2d, at 27); *United States* v. *County of Fresno*, 429 U. S., at 465 (upholding a state tax on federal lessees because "appellants who rent from the Forest Service are no worse off under California tax laws than those who work for private employers and rent houses in the private sector").

[8] In *Washington* v. *United States*, we also placed reliance on the fact that the state tax at issue was imposed at the same rate on every retail sale in the State and that "virtually every citizen is affected by the tax in the same way." 460 U. S., at 545–546. Therefore, we concluded, there was a "political check" because the "state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Id.*, at 545. As we explained in *United States* v. *County of Fresno*, *supra*, at 463, n. 11: "A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by causing the Federal Government to pay prohibitively high salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all other residents and voters of the State." A "political check" "has been thought necessary because the United States does not have a direct voice in the state legislatures." *Washington* v. *United States*, 460 U. S., at 545.

This Court has never upheld a state tax or regulation triggered solely by a federal transaction where the Court did not also find that the tax or regulation was part of a larger scheme that affected a politically significant number of citizens of the State. See *ibid.*; *County of Fresno*, *supra*, at 465 (upholding a special tax on federal employees because the Court found that an equivalent tax was imposed on other state residents). In contrast, there is no one represented in the North Dakota State Legislature to provide a political check on that State's liquor labeling regulation because it affects solely out-of-state companies and the Federal Government.

The plurality attempts to reach the opposite result by arguing that we need to view the state regulatory scheme in its entirety to determine whether the Federal Government is better or worse off on the whole, in the endeavor affected by a seemingly discriminatory State law, than those given preferred treatment by that law. See *ante*, at 435. This Court has never subscribed to such an approach. To the contrary, *Washington* v. *United States*, *supra*, which the plurality cites for this proposition, holds merely that where "[t]he tax on federal contractors is part of the same structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors" it is nondiscriminatory. *Id.*, at 545. In so deciding, the Court specifically cautioned that "[a] different situation would be presented if a State imposed a sales tax on contractors who work for the Federal Government, and an entirely different kind of tax, such as a head tax or a payroll tax, on every other business." *Id.*, at 546, n. 11.

In *Washington* v. *United States*, we found that the state building tax on federal contractors and the slightly larger building tax on private landowners placed no larger an economic burden on federal contractors than on private ones. The Court concluded that although the legal incidence of the taxes was different—one fell on the landowners directly and the other on the federal contractors—the tax did not discriminate against federal contractors or the Federal Government because each tax would be reflected in the fees the contractors could charge. As a result, the Court concluded that the tax on the federal contractors cost them no more than the equivalent tax borne indirectly by their private counterparts, and very likely cost them less. *Id.*, at 541–542.

The conclusion to be drawn from *Washington* v. *United States* is that North Dakota would not violate the federal immunity doctrine by placing a labeling requirement on the out-of-state distillers who supply the military bases within the State if it also imposed the same labeling requirement di-

rectly on the in-state wholesalers for all liquor purchased out of state. The plurality's view, that the labeling regulation is not discriminatory unless the entire North Dakota liquor regulatory system places the Federal Government at a disadvantage competing with in-state wholesalers or retailers, is a different proposition altogether. See also JUSTICE SCALIA's opinion, *ante*, at 448.

The plurality argues that, in this case, the State compensates the Federal Government for the discriminatory labeling requirement by prohibiting private retailers from buying liquor from out-of-state suppliers and that therefore the Government is favored over other North Dakota retailers. There are core difficulties with this comparison. Since the regulation is imposed on out-of-state suppliers, the regulation would affect the Federal Government when it purchases liquor from those suppliers. The private parties within the State who are comparable, therefore, are North Dakota wholesalers who purchase liquor outside the State and resell it to the distributors and retailers farther down the distribution chain within the State—not North Dakota retailers.

The appropriate comparison between the Federal Government and its actual private counterpart—a North Dakota wholesaler—cannot be made with confidence. The regulations that the plurality presumes are economically equivalent are so entirely unlike that it is wholly speculative that the impositions on in-state wholesalers are comparable to the imposition on the Federal Government and its suppliers. Such a comparison requires us to determine whether there is greater profit in buying from out-of-state distillers at a price that does not reflect the labeling requirement while reaping only the wholesaler's mark-up, or whether it is more lucrative to buy from whomever will sell specially labeled liquor at whatever price this costs but to reap the margin on retail sales. Even if the comparison could be made reliably at some set moment, there is no reason to expect the result to

be the same every year; it would vary depending on the business conditions affecting each half of the equation.[9]

As is obvious, there is simply no assurance that North Dakota is actually regulating evenhandedly when it taxes and licenses some and requires special product labels for others. The labeling regulation is not part of a larger scheme where like obligations are imposed, albeit at different stages of commerce, on federal and nonfederal suppliers. It is that "different situation," that we identified in *Washington* v. *United States*, where unlike and hard to compare obligations are imposed. Contrary to the plurality's assertion, *ante* at 438, *Washington* v. *United States* does not require or even support a finding that the regulation is constitutional. To the contrary, when a State imposes an obligation, triggered solely by a federal transaction, that cannot be found with confidence to place the Federal Government and its contractors in as good a position as, or better than, its counterparts in the pri-

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[9] Even if the plurality were correct that the appropriate comparison were to a North Dakota retailer, so long as the Government continues to purchase liquor out of state, its relative position turns on another apples-and-oranges comparison. Is it economically advantageous to reimburse out-of-state distillers for the cost of compliance with the State's labeling requirement but to avoid paying a wholesaler's markup? Or is paying the wholesaler's markup less expensive, when the base price to the wholesaler need not reflect the cost of compliance?

It is true that if the Government simply purchased liquor from North Dakota's own wholesalers—at an estimated increased cost of $200,000 to $250,000 in the next year—it would avoid the labeling requirement and thereby occupy the same position as North Dakota retailers. But the regulation cannot be claimed to be nondiscriminatory on the ground that the Government has the option to do what the State may not force it to do directly—*i. e.*, purchase liquor inside the State. Even the plurality concedes that North Dakota may not permissibly restrict the Government from purchasing liquor out of state. See *ante*, at 440. Thus, to be considered nondiscriminatory the North Dakota regulatory scheme, even under the plurality's approach, must place the Federal Government and its suppliers in as good a position as their North Dakota counterparts *even if the Government chooses not to purchase liquor in state.*

vate sector, our cases require a finding that the regulation is wholly impermissible.[10]

III

JUSTICE SCALIA, alone, agrees with appellants that § 2 of the Twenty-first Amendment[11] saves the labeling regulation because the regulation governs the importation of liquor into the State. I believe, however, that the question presented in this case, whether the Twenty-first Amendment empowers States to regulate liquor shipments to military bases over which the Federal Government and a State share concurrent jurisdiction, is one we have addressed before and answered in the negative. In *Mississippi Tax Comm'n II*, 421 U. S. 599 (1975),[12] we explained:

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[10] By contrast, North Dakota's reporting requirement does not discriminate against either the military bases or the distillers and importers who supply them, nor does it obstruct federal operations. By its terms, it is imposed on "[a]ll persons sending or bringing liquor into North Dakota." N. D. Admin. Code § 84-02-01-05(1) (1986). The regulation requires all out-of-state suppliers to make monthly reports to the State whether they sell to the Federal Government or to private firms in North Dakota. The military's suppliers are in no different a position vis-à-vis the reporting requirement than they would be if they were supplying the private sector. The military is in no different a position than any private firm importing liquor into North Dakota. Nor was there any evidence introduced showing that the regulation interferes with the military's ability to comply with the affirmative federal policy of purchasing liquor in bulk from the most competitive sources in the country. The reporting requirement has been in effect since 1978, and, therefore, none of the suppliers' refusals to deal or increase of prices announced in 1986 can be attributed plausibly to this requirement alone.

[11] Section 2 of the Twenty-first Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[12] The two *Mississippi Tax Comm'n* cases required us to decide whether Mississippi constitutionally could require out-of-state liquor suppliers to collect a tax from the Federal Government on liquor shipped to four military bases within the State's boundaries. The Government had exclusive jurisdiction over two of the bases and concurrent jurisdiction over the

"'[T]he Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction.'" *Id.*, at 613, quoting *Mississippi Tax Comm'n I*, 412 U. S., at 375.

"We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, §8, cl. 17, does not apply: 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction. . . .

" . . . [I]t is a 'patently bizarre' and 'extraordinary conclusion' to suggest that the Twenty-first Amendment abolished federal immunity as respects taxes on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction, and 'now that the claim for the first time is squarely presented, we expressly reject it.'" *Mississippi Tax Comm'n II*, *supra*, at 613–614 (quoting *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341, 345–346 (1964), and *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S., at 332).

Appellants argue that *Mississippi Tax Comm'n II* is applicable only to taxes or other regulations imposed directly on the United States, because the legal incidence of the tax at issue in that case fell on the military, not its supplier. See 421 U. S., at 609. Appellants' reliance on this distinction, however, is misplaced. To be sure, a tax or regulation imposed directly on the Federal Government is invariably invalid under the doctrine of federal immunity whereas a tax

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other two. In *Mississippi Tax Comm'n I*, 412 U. S. 363 (1973), we decided in favor of the United States as to the two exclusive jurisdiction enclaves. In *Mississippi Tax Comm'n II*, we decided in favor of the United States as to the two concurrent jurisdiction enclaves.

or regulation imposed on those who deal with the Government is invalid only when it actually obstructs or discriminates against federal activity. But the labeling regulation at issue here and the tax at issue in *Mississippi Tax Comm'n II*, *supra*, violate the doctrine of federal immunity for precisely the same reason: They burden the Federal Government in its conduct of governmental operations. A state regulation that obstructs federal activity is invalid, no matter whom it regulates. To the extent that appellants assume that there are two doctrines of federal immunity—one that protects the Government from direct taxation or regulation and one that protects the Government from the indirect effects of taxes or regulations imposed on those with whom it deals—appellants misconstrue the law.

JUSTICE SCALIA argues that *Mississippi Tax Comm'n II* holds only that the Twenty-first Amendment did not override the Government's immunity from state taxation but did not reach the question whether the Amendment also overrode federal immunity from state regulation. See *ante*, at 447–448. I agree that the Court had only a state tax question before it in that decision, but I do not agree that the Court intended to leave the question of state regulation open. See *Mississippi Tax Comm'n II*, *supra*, at 613 (concluding that its decision that States have no power to *regulate* the importation of liquor into exclusive jurisdiction federal enclaves is also applicable to concurrent jurisdiction enclaves).

JUSTICE SCALIA's argument raises two separate questions. First, how do we separate those state liquor importation laws that the Twenty-first Amendment permits to override federal laws and other constitutional prohibitions from those laws it does not? Second, how do we determine whether liquor is being imported into North Dakota or into a federal island within the boundaries of the State?

The first is perhaps the more difficult question. It is clear from our decisions that the power of States over liquor trans-

actions is not plenary,[13] even when the State is attempting to regulate liquor importation.[14] To the extent that JUSTICE SCALIA concedes that *Mississippi Tax Comm'n II* is decided correctly, *ante*, at 447–448, his assumption that concurrent jurisdiction federal enclaves are within the State for Twenty-first Amendment purposes requires him to concede that under certain circumstances the "transportation or importation" of liquor into a State "in violation of the laws" of the State in which the enclave is located is *not* prohibited by the Twenty-first Amendment. This is true because we decided that out-of-state importers and distillers could ship liquor to military bases without collecting and remitting the use tax required by Mississippi law. Thus, JUSTICE SCALIA's approach of drawing a line between taxes and regulations, while consistent with some of our cases, is inconsistent with others such as

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[13] See, *e. g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984) (invalidating a Hawaiian liquor tax because it discriminated against interstate commerce); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984) (invalidating an Oklahoma prohibition of wine advertisements on cable television broadcasts to households within its jurisdiction); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980) (deciding that California lacked the power to sanction horizontal price fixing for wine sold within its borders); *Craig* v. *Boren*, 429 U. S. 190 (1976) (striking down, under the Equal Protection Clause, a state law setting different drinking ages for men and women); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964) (holding that New York lacked power to tax or regulate liquor sold at an airport under state jurisdiction but under Federal Bureau of Customs supervision and intended for use outside the state).

[14] See, *e. g.*, *Healy* v. *Beer Institute, Inc.*, 491 U. S. 324 (1989) (invalidating a Connecticut law that required out-of-state shippers of beer to affirm that their prices to Connecticut were no higher than the prices charged in bordering States on the ground that the regulation gave Connecticut a prohibited power over commerce outside its borders); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964) (striking down Kentucky's import tax on scotch under the Export-Import Clause).

Healy v. *Beer Institute, Inc.*, 491 U. S. 324 (1989). See n. 13, *supra*.[15]

There is no need, however, to suggest a resolution as to the exact powers of a State to regulate the importation of liquor into its own territory in this case, because the second question raised by JUSTICE SCALIA's approach is dispositive here. I continue to agree with the Court's position in *Mississippi Tax Comm'n II* that concurrent jurisdiction federal enclaves, like exclusive jurisdiction federal enclaves,[16] are not within a "State" for purposes of the Twenty-first Amendment. 421 U. S., at 613.

In addition, North Dakota appears to have ceded all of its power concerning the two federal enclaves within its boundaries, and to enjoy concurrent jurisdiction only through the grace of the United States Air Force. As noted by the plurality, see *ante*, at 429, n. 2, the parties offer no details concerning the terms of the concurrent jurisdiction on these two bases. But the public record fills in some quite relevant data. North Dakota has long ceded by statute to the Federal Government full jurisdiction over any tract of land that may be acquired by the Government for use as a military post (retaining only the power to serve process within). See

[15] To the extent that the Twenty-first Amendment was intended to permit States to prohibit liquor altogether, it is arguable that even federal immunity might not permit the Federal Government to import liquor into a completely dry State to sell at a federal post office or to serve at a cocktail party in a federal court building. But if the Court, as JUSTICE SCALIA urges, may draw a line between regulations and taxes, which are in fact just one form of regulation, the Court might even more plausibly draw a line between regulations which govern whether liquor may be imported into a State's territory under any circumstances and those which govern merely the circumstances under which liquor may be imported.

[16] See *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938), in which this Court found unconstitutional the application of California's liquor taxes and regulations to private concessionaires operating hotels, camps, and stores in Yosemite National Park on the ground that the park was an exclusive federal enclave.

N. D. Cent. Code § 54–01–08 (1989). Thus, the State ceded its jurisdiction over the Air Force bases long since.[17] Moreover, North Dakota defines its own jurisdiction as extending to all places within its boundaries *except*, where jurisdiction has been or is ceded to the United States, the State's jurisdiction is "qualified by the terms of such cession or the laws under which such purchase or condemnation has been or may be made." See N. D. Cent. Code § 54–01–06 (1989). Since 1970, Congress has provided that the branches of the armed services could retrocede some or all of the United States' jurisdiction over any property administered by them if exclusive jurisdiction is considered unnecessary. See 10 U. S. C. § 2683. North Dakota's laws permit the Governor to consent to any retrocession of jurisdiction offered. See N. D. Cent. Code § 54–01–09.3 (1989).

Contrary to the plurality's suggestion, see *ante*, at 429, n. 2, we have never held that "concurrent jurisdiction" always means that the State and the Federal Government each have plenary authority over the territory in question. To the contrary, each decision cited by the plurality either does not address the question, see, *e. g.*, *Mississippi Tax Comm'n I*, 412 U. S., at 380–381, or says that the division of authority over territory under concurrent jurisdiction is determined by

[17] While the parties do not say when the Grand Forks and Minot Air Force enclaves were acquired, the public record does indicate that as recently as 1962 North Dakota had no territory under partial or concurrent jurisdiction with the Federal Government, see Haines, Crimes Committed on Federal Property—Disorderly Jurisdictional Conduct, 4 Crim. Just. J. 375, 402 (1981), and that the statute ceding exclusive jurisdiction over military bases within its boundaries has been in effect since at least 1943. See Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, Part I, p. 190 (1956). Thus, at whatever point this land was acquired, North Dakota consented to its being governed under exclusive federal jurisdiction.

A state statute ceding jurisdiction suffices as consent to exclusive federal jurisdiction under Art. I, § 8, cl. 17 (giving Congress the power to exercise exclusive legislation over land only if the State in which it is located consents). See *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525 (1885).

the terms of the cession of jurisdiction by the State. See *James* v. *Dravo Contracting Co.*, 302 U. S., at 142 ("If lands are otherwise acquired [not as exclusive jurisdiction enclaves], and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction"); *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651–652 (1930). Therefore, even were I to accept the proposition that a concurrent jurisdiction federal enclave might be a "State" for purposes of the Twenty-first Amendment, I would regard the State's authority over the North Dakota bases as an open question for which remand for further proceedings, not reversal, is the appropriate action.

V

Because I find that North Dakota's labeling requirement both discriminates against the Federal Government and its suppliers and obstructs the operations of the Federal Government, I cannot agree with the Court that it is valid. The operations of the Federal Government are constitutionally immune from such interference by the several States.

DAVIS ET UX. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89–98. Argued March 26, 1990—Decided May 21, 1990

Section 170 of the Internal Revenue Code of 1954 permits a taxpayer to claim a charitable contribution deduction only if the contribution is made "to or for the use of" a qualified organization. Petitioner husband and wife, who are members of the Church of Jesus Christ of Latter-day Saints (Church) claimed such deductions for funds transferred to their sons while they were serving as full-time, unpaid missionaries for the Church. The Church requested the payments, set their amounts, and, through written guidelines, instructed that they be used exclusively for missionary work. In accordance with the guidelines, petitioners' sons used the money primarily to pay for rent, food, transportation, and personal needs while on their missions. When the Internal Revenue Service denied petitioners' claim, they filed suit in the District Court. The court ruled in favor of the Government, holding that the payments were not "for the use of" the Church under § 170 because the Church lacked sufficient possession and control of the funds. The court also rejected petitioners' alternative claim that the payments were deductible under Treas. Reg. 1.170 A–1(g)—which allows the deduction of "unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible"—on the ground that petitioners were not themselves performing donated services. The Court of Appeals affirmed.

Held:

1. The funds transferred by petitioners to their sons were not donated "for the use of" the Church within the meaning of § 170. Pp. 478–486.

(a) In choosing the phrase "for the use of," Congress was most likely referring to donations made to a legally enforceable trust or a similar legal arrangement. Although, on its face, the quoted phrase could support any number of meanings, the history of the statute indicates that Congress added the phrase to § 170 in 1921 for the purpose of overruling the Government's prior interpretation that a gift to a trust for a charitable purpose was not deductible. Construing the phrase as referring to a trust or similar arrangement comports with the accepted meaning in 1921 of "use" as synonymous with the term "trust." Pp. 479–482.

(b) Thus, the Service's contemporaneous and longstanding interpretation that the phrase "for the use of" is intended to convey a similar

meaning as "in trust for" is consistent with the statutory language, fully implements Congress' apparent purpose in adopting it, and must be accepted. Pp. 482–484.

(c) There is no evidence to support petitioners' contentions that Congress intended the phrase "for the use of" to be interpreted as referring to fiduciary relationships in general or as referring to a type of relationship that gives a qualified organization a reasonable ability to supervise the use of contributed funds. Pp. 484–485.

(d) The record does not support a finding that petitioners transferred the funds to their sons "in trust for," or through a similarly enforceable legal arrangement for the benefit of, the Church. There is no evidence that petitioners took any steps normally associated with creating a trust or similar legal arrangement; that the sons had any legal obligation to comply with their promise to use the money in accordance with the Church's guidelines; or that the Church might have a legal entitlement to the money or to a civil cause of action against missionaries using such money for purposes not approved by the Church. Pp. 485–486.

2. The transfer of funds by petitioners to their sons was not a contribution "to" the Church under Treas. Reg. 1.170 A–1(g). The regulation's plain language indicates that taxpayers may claim deductions only for "unreimbursed expenditures" incurred in connection with their own "rendition of services to [a qualified] organization." Pp. 486–489.

861 F. 2d 558, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Rex E. Lee argued the cause for petitioners. With him on the brief were *Carter G. Phillips* and *Bart M. Davis*.

Assistant Attorney General Peterson argued the cause for the United States. With her on the brief were *Solicitor General Starr*, *Deputy Solicitor General Wallace*, *Alan I. Horowitz*, *David I. Pincus*, and *Francis M. Allegra*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We are called upon in this case to determine whether the funds petitioners transferred to their two sons while they served as full-time, unpaid missionaries for the Church of

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**Wilford W. Kirton, Jr.*, *Raeburn G. Kennard*, and *Robert P. Lunt* filed a brief for the Church of Jesus Christ of Latter-day Saints as *amicus curiae* urging reversal.

Jesus Christ of Latter-day Saints (Church) are deductible as charitable contributions "to or for the use of" the Church, pursuant to 26 U. S. C. § 170 (1982 ed.).

I

Petitioners, Harold and Enid Davis, and their sons, Benjamin and Cecil, are members of the Church. According to the stipulated facts, the Church operates a worldwide missionary program involving 25,000 persons each year. Most of these missionaries are young men between ages 19 and 22. If the Church determines that a candidate is qualified to become a missionary, the president of the Church sends a letter calling the candidate to missionary service in a specified geographical location. A follow-up letter from the missionary department lists the items of clothing the missionary will need, provides specific information relating to the mission, and sets forth the estimated amount of money needed to support the missionary service. This amount varies according to the location of the mission and reflects an estimate of the amount the missionary will actually need.

The missionary's parents generally provide the necessary funds to support their son or daughter during the period of missionary service. If they are unable to do so, the Church will locate another donor from the local congregation or use money donated to the Church's general missionary funds. The Church believes that having individual donors send the necessary funds directly to the missionary benefits the Church in several important ways. Specifically, it "fosters the Church doctrine of sacrifice and consecration in the lives of its people" as well as reducing the administrative and bookkeeping requirements which would otherwise be imposed upon the Church. App. to Pet. for Cert. 32a.

After accepting the call, the missionary candidate receives priesthood ordinances to serve as an official missionary and minister of the Church. During the missionary service, the mission president (leader of the mission) controls many as-

pects of the missionaries' lives, including the manner of dress and grooming. Missionaries are required to conform to a daily schedule which calls for at least 10 hours per day of actual missionary work in addition to study time, mealtime, and planning time. Mission rules forbid dating, movies, plays, certain sports, and other activities; missionaries are not allowed to take vacations or travel for personal purposes.

Missionaries receive some supervision over their use of funds. The Missionary Handbook instructs missionaries that "[t]he money you receive for your support is sacred and should be spent wisely and only for missionary work. Keep expenses at a minimum. . . . Keep a financial record of all expenditures." App. 13. The mission presidents give similar instructions to the missionaries under their supervision. Although missionaries are not required to obtain advance approval of each expenditure they make from their personal checking account, they do submit weekly reports to their group leader listing the amount of time spent in Church service, the type of missionary work accomplished, and a report of the total expenses for the week and month to date. If a missionary begins to accumulate surplus funds, he is expected to take action to reduce the amount of donations sent to him. The mission president may alter his estimates of the amounts required each month to take into account changing circumstances.

Benjamin and Cecil Davis both applied to become missionaries. In 1979, the Church notified Benjamin by letter that he had been called to missionary service at the New York Mission. A second letter informed him of the estimated amount of money which would be needed to support his service. In 1980, Cecil Davis was notified that he had been called to missionary service at the New Zealand–Cook Island Mission. Cecil also received a second letter informing him about the mission and the amount of money he would need. Petitioners notified their bishop that they would provide the funds requested by the Church to meet their sons' mission

expenses. According to petitioners, both sons made a commitment with them to use the money only in accordance with the Church's instructions.

Petitioners transferred to Benjamin's personal checking account, on which he was the sole authorized signatory, $3,480.89 in 1980 and $4,135 in 1981. During 1981, petitioners transferred $1,518 to Cecil's personal checking account, on which he was the sole authorized signatory. Benjamin and Cecil used this money primarily to pay for rent, food, transportation, and personal needs while on their missions. Benjamin also spent approximately $20 per month to purchase religious tracts and other materials used during his missionary work. Neither Benjamin nor Cecil was required to seek or sought specific approval of each expenditure made from his personal checking account. However, each week Benjamin and Cecil submitted a report of the total expenses for the week and month to date. At the end of their service, Cecil had no money remaining in his account; Benjamin had $150 which he used to purchase a camera. (Petitioners do not claim a deduction for this amount.)

In their joint tax returns filed in 1980 and 1981, petitioners claimed their sons as dependents, but did not claim a charitable contribution deduction under 26 U. S. C. § 170 for the funds sent their sons during their missionary service. On April 16, 1984, petitioners filed an amended income tax return for the years 1980 and 1981, claiming additional charitable contributions of the $3,480.89 and $4,882 paid to their sons during the missionary service. In January 1985, the Internal Revenue Service disallowed the refunds. Petitioners filed a refund suit in the United States District Court for the District of Idaho. In September 1986, petitioners filed a second set of amended returns, limiting their charitable deductions to the amounts indicated by the Church and correcting the number of dependents claimed for each year.

In District Court, petitioners and the United States both moved for summary judgment. 664 F. Supp. 468 (Idaho

1987). Petitioners argued that the payments they made to support their sons' missionary services were charitable contributions "for the use of" the Church. Alternatively, they claimed the payments were deductible under Treas. Reg. 1.170A–1(g), 26 CFR § 1.170A–1(g) (1989), which allows the deduction of "unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible." The District Court ruled in favor of the United States. It rejected petitioners' claimed deduction for unreimbursed expenditures because petitioners were not themselves performing donated services, and it held that petitioners' payments to their sons were not "for the use of" the Church because the Church lacked sufficient possession and control of the funds. 664 F. Supp., at 471–472.

The Court of Appeals for the Ninth Circuit affirmed. 861 F. 2d 558 (1988). The Court of Appeals rejected petitioners' claim that the transferred funds were deductible contributions because they conferred a benefit on the Church. *Id.*, at 561. Instead, the Court of Appeals held that contributions are deductible only when the recipient charity exercises control over the donated funds. *Id.*, at 562. The Court of Appeals reasoned that the beneficiary of a charitable contribution must be indefinite, see *Russell* v. *Allen*, 107 U. S. 163, 167 (1883), and that this requirement cannot be met when the taxpayer makes a contribution directly to the intended beneficiary. In this case, the Court of Appeals concluded that the Church lacked actual control over the disposition of the funds and thus they were not deductible. 861 F. 2d, at 562. The Court of Appeals agreed with the District Court that § 1.170A–1(g) did not apply to petitioners, as the regulation permits a deduction for unreimbursed expenses only by the taxpayer who performed the charitable service. *Id.*, at 564.

Because the Court of Appeals' decision conflicted with *White* v. *United States*, 725 F. 2d 1269, 1270–1272 (CA10 1984), and *Brinley* v. *Commissioner*, 782 F. 2d 1326, 1336

(CA5 1986), we granted certiorari, 493 U. S. 953 (1990), and now affirm.

II

Under § 170 of the Internal Revenue Code of 1954, 68A Stat. 58, as amended, 26 U. S. C. § 170 (1982 ed.), a taxpayer may claim a deduction for a charitable contribution only if the contribution is made "to or for the use of" a qualified organization. This section provides, in pertinent part:

"(a) Allowance of deduction.

"(1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

. . . . .

"(c) Charitable contribution defined.—For purposes of this section, the term 'charitable contribution' means a contribution or gift *to or for the use of*—

. . . . .

"(2) A corporation, trust, or community chest, fund, or foundation—

. . . . .

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ." (Emphasis added.)

Petitioners contend that the funds they transferred to their sons' accounts are deductible as contributions "for the use of" the Church. Alternatively, petitioners claim these funds are unreimbursed expenditures under Treasury Regulation § 1.170A–1(g) and therefore are deductible as contributions "to" the Church.* We first consider whether the payments

*The Commissioner has adopted the holding in *Rockefeller* v. *Commissioner*, 676 F. 2d 35, 42 (CA2 1982), that unreimbursed expenses are contributions "to" the Church rather than "for the use of" the Church. See Rev. Rul. 84–61, 1984–1 Cum. Bull. 40.

at issue here are "for the use of" the Church within the meaning of § 170.

On its face, the phrase "for the use of" could support any number of different meanings. See, *e. g.*, Webster's New International Dictionary (2d ed. 1950) ("use" defined in general usage as "to convert to one's service"; "to employ"; or, in law, "use imports a trust" relationship). Petitioners contend that the phrase "for the use of" must be given its broadest meaning as describing "the entire array of fiduciary relationships in which one person conveys money or property to someone else to hold or employ in some manner for the benefit of a third person." Brief for Petitioners 17. Under this reading, no legally enforceable relationship need exist between the recipient of the donated funds and the qualified donee; in effect, any intermediary may handle the funds in any way that would arguably benefit a charitable organization, regardless of how indirect or tangential the benefit might be. Petitioners also advance a second, somewhat narrower interpretation, specifically that a contribution is "for the use of" a qualified organization within the meaning of § 170 so long as the donee has "a reasonable ability to ensure that the contribution primarily serves the organization's charitable purposes." *Id.*, at 26. In this case, petitioners argue that their payments at least meet this second interpretation. They point to the Church's role in requesting the funds, setting the amount to be donated, and requiring weekly expense sheets from the missionaries. The Service, on the other hand, has historically defined "for the use of" as conveying "a similar meaning as 'in trust for.'" See, *e. g.*, I. T. 1867, II–2 Cum. Bull. 155 (1923).

Although the language of § 170 would support the interpretation of either the Service or petitioners, the events leading to the enactment of the 1921 amendment adding the phrase "for the use of" to § 170 indicate that Congress had a specific meaning of "for the use of" in mind. The original version of § 170, promulgated in the War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330, did not allow deductions for gifts "for

the use of" a qualified donee. Rather, it allowed individuals to deduct only "[c]ontributions or gifts . . . to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes. . . ." In interpreting this provision in the Act (and in the subsequent Revenue Act of 1918, ch. 18, § 214(a)(11), 40 Stat. 1068), the Bureau of Internal Revenue stated that "[c]ontributions to a trust company (a corporation) in trust to invest and disburse them for a charitable purpose are not allowable deductions under [§ 170]." O. D. 669, 3 Cum. Bull. 187 (1920). In hearings before the Senate Committee on Finance on the proposed Revenue Act of 1921, representatives of charitable foundations requested an amendment making gifts to trust companies and similar donees deductible even though a trustee, rather than a charitable organization, held legal title to the funds. Hearings on Proposed Revenue Act of 1921 before the Senate Committee on Finance, 67th Cong., 1st Sess., 521 (1921). Testimony before the Committee indicated that numerous communities had established charitable trusts, charitable foundations, or community chests so that individuals could donate money to a trustee who held, invested, and reinvested the principal, and then turned the principal over to a committee that distributed the funds for charitable purposes. *Id.*, at 522–526; see also H. R. Rep. No. 350, 67th Cong., 1st Sess., 12 (1921) (House Comm. on Ways and Means) (amendments "would allow the deduction, under proper restriction, of contributions or gifts to a community chest fund or foundation"); S. Rep. No. 275, 67th Cong., 1st Sess., 18 (1921). Responding to these concerns, Congress overruled the Bureau's interpretation of § 170 (then § 214(a)(11)) by adding the phrase "for the use of . . . any corporation, or community chest, fund, or foundation . . ." to the charitable deduction provision of the Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 241. In light of these events, it can be inferred that Congress' use of the phrase "for the use of" related to its purpose in amending § 170 of allowing tax-

payers to deduct contributions made to trusts, foundations, and similar donees. An interpretation of "for the use of" as conveying a similar meaning as "in trust for" would be consistent with this goal.

It would have been quite natural for Congress to use the phrase "for the use of" to indicate its intent of allowing deductions for donations in trust, as this phrase would have suggested a trust relationship to the members of the 67th Congress. From the dawn of English common law through the present, the word "use" has been employed to refer to various forms of trust arrangements. See 1 G. Bogert, Trusts and Trustees § 2, p. 9 (1935); Black's Law Dictionary 1382 (5th ed. 1979) ("*Uses* and *trusts* are not so much different things as different aspects of the same subject. A use regards principally the beneficial interest; a trust regards principally the nominal ownership"). In the early part of this century, the word "use" was technically employed to refer to a passive trust, but less formally used as a synonym for the word "trust." See Bogert, *supra*, at 9 ("The words 'use' and 'trust' are employed as synonyms frequently by writers and judges"); 1 R. Baldes, Perry on Trusts and Trustees § 298 (7th ed. 1929) ("A *use*, a *trust*, and a *confidence* is one and the same thing . . ."); 1 Restatement of Trusts §§ 67–72 (Effect of Statute of Uses) (1935). The phrases "to the use of" or "for the use of" were frequently used in describing trust arrangements. See, *e. g.*, *United States* v. *Bowling*, 256 U. S. 484, 486 (1921); *Blanset* v. *Cardin*, 256 U. S. 319, 321 (1921); *Rand* v. *United States*, 249 U. S. 503, 508 (1919). Given that this meaning of the word "use" precisely corresponded with Congress' purpose for amending the statute, it appears likely that in choosing the phrase "for the use of" Congress was referring to donations made in trust or in a similar legal arrangement.

This understanding is confirmed by the Bureau's initial interpretation of the phrase. It is significant that almost immediately following the amendment of § 170, the Commis-

sioner interpreted the phrase "for the use of" as "intended to convey a similar meaning as 'in trust for.'" I. T. 1867, II–2 Cum. Bull. 155 (1923). Rejecting a taxpayer's claim that a gift to a volunteer fire company was deductible as a contribution for the use of the municipality, the Bureau noted that "[i]t does not appear that the municipality in any way has any control over the property of the incorporated volunteer fire company or that it has any voice in the manner in which such property should be used. Upon dissolution of the company, the property would not escheat to the State. A right of appropriation or enjoyment of the property of the fire company does not rest in the municipality." *Ibid.* The Service adhered to its interpretation that "for the use of" conveys "a similar meaning as 'in trust for'" in subsequent rulings permitting taxpayers to deduct the value of gifts irrevocably transferred to a trust for the benefit of qualified organizations. See, *e. g.*, Rev. Rul. 55–275, 1955–1 Cum. Bull. 295; Rev. Rul. 194, 1953–2 Cum. Bull. 128; I. T. 3707, 1945 Cum. Bull. 114. Numerous judicial decisions have relied on this interpretation. See, *e. g.*, *Rockefeller* v. *Commissioner*, 676 F. 2d 35, 40 (CA2 1982); *Orr* v. *United States*, 343 F. 2d 553, 557–558 (CA5 1965); *Thomason* v. *Commissioner*, 2 T. C. 441, 444 (1943); *Danz* v. *Commissioner*, 18 T. C. 454, 464 (1952), aff'd on other grounds, 231 F. 2d 673 (CA9 1955), cert. denied, 352 U. S. 828 (1956). Congress' reenactment of the statute in 1954, using the same language, indicates its apparent satisfaction with the prevailing interpretation of the statute. See *Cammarano* v. *United States*, 358 U. S. 498, 510 (1959); *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493 (1931).

The Commissioner's interpretation of "for the use of" thus appears to be entirely faithful to Congress' understanding and intent in using that phrase. Moreover, the Commissioner's interpretation is consistent with the purposes of § 170 as a whole. In enacting § 170, "Congress sought to provide tax benefits to charitable organizations, to encourage the de-

velopment of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." *Bob Jones University* v. *United States*, 461 U. S. 574, 588 (1983). The Commissioner's interpretation of "for the use of" assures that contributions will in fact foster such development because it requires contributions to be made in trust or in some similar legal arrangement. A defining characteristic of a trust arrangement is that the beneficiary has the legal power to enforce the trustee's duty to comply with the terms of the trust. See, *e. g.*, 3 W. Fratcher, Scott on Trusts § 200 (4th ed. 1988); 1 Restatement of Trusts § 200 (1935). A qualified beneficiary of a bona fide trust for charitable purposes would have both the incentive and legal authority to ensure that donated funds are properly used. If the trust contributes funds to a range of charitable organizations so that no single beneficiary could enforce its terms, the trustee's duty can be enforced by the Attorney General under the laws of most States. See 4A W. Fratcher, Scott on Trusts § 391 (4th ed. 1989); G. Bogert, Trusts and Trustees § 411 (2d ed. 1977). Although the Service's interpretation does not require that the qualified organization take actual possession of the contribution, it nevertheless reflects that the beneficiary must have significant legal rights with respect to the disposition of donated funds.

Petitioners argue that any interpretation of "for the use of" that requires a qualified donee to have the same degree of control over contributed funds as a beneficiary would have over a trust *res* would make "for the use of" redundant, meaning no more than "to." We disagree. When Congress amended § 170, it was fully aware of the Bureau's ruling that the original statutory deduction for contributions "to" a qualified organization could not be claimed for contributions made in trust for the organization. See O. D. 669, 3 Cum. Bull. 187 (1920). Accordingly, Congress amended the statute specifically to overcome this interpretation. Moreover, a contribution made in trust for a charity does not give the charity

immediate possession and control, as does a donation directly to a charity. Unlike a contribution that must go "to" a qualified organization, a contribution "for the use of" a donee may go to a trustee with the discretion to select among a number of qualified donees to whom the funds may be disbursed. See, *e. g.*, *Bowman* v. *Commissioner*, 16 B. T. A. 1157, 1163–1164 (1929). Furthermore, a taxpayer may generally claim an immediate deduction for a gift to a trustee, even though receipt of the gift by the charity is delayed. Recognizing this characteristic of gifts in trust, Congress further amended § 170 in 1964 in order to encourage donations "to" a charity, because donations "in trust for" a charity "often do not find their way into operating philanthropic endeavors for extended periods of time." S. Rep. No. 830, 88th Cong., 2d Sess., 59–60 (1964).

Although the Service's interpretive rulings do not have the force and effect of regulations, see *Bartels* v. *Birmingham*, 332 U. S. 126, 132 (1947), we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use. See, *e. g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). Under the circumstances presented here, we think there is good reason to accept the Service's interpretation of "for the use of." The denial of deductions for donations in trust that prompted Congress to amend § 170, the accepted meaning of "use" as synonymous with the term "trust," and the Service's contemporaneous and longstanding construction of § 170 constitute strong evidence in favor of this interpretation.

Although the language of the statute may also bear petitioners' interpretation, they have failed to establish that their interpretation is compelled by the statutory language. To the contrary, there is no evidence that Congress intended the phrase "for the use of" to be interpreted as referring to fiduciary relationships in general or as referring to a type of relationship that gives a qualified organization a reasonable abil-

ity to supervise the use of contributed funds. Rather, as noted above, there are strong indications that Congress intended a more specific meaning. Moreover, petitioners' interpretations would tend to undermine the purposes of § 170 by allowing taxpayers to claim deductions for funds transferred to children or other relatives for their own personal use. Because a recipient of donated funds need not have any legal relationship with a qualified organization, the Service would face virtually insurmountable administrative difficulties in verifying that any particular expenditure benefited a qualified donee. Cf. § 170(a)(1). Although there is no suggestion whatsoever in this case that the transferred funds were used for an improper purpose, it is clear that petitioners' interpretation would create an opportunity for tax evasion that others might be eager to exploit. See, *e. g.*, Scialabba, Kurtzman, & Steinhart, Mail-Order Ministries Under the Section 170 Charitable Contribution Deduction: The First Amendment Restrictions, the Minister's Burden of Proof, and the Effect of TRA '86, 11 Campbell L. Rev. 1 (1988); Note, "I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion, 25 Am. Crim. L. Rev. 113 (1987). We need not determine whether petitioners' interpretation of "for the use of" would have been a permissible one had the Service decided to adopt it, though we note that the Service may retain some flexibility to adopt other interpretations in the future. It is sufficient to decide this case that the Service's longstanding interpretation is both consistent with the statutory language and fully implements Congress' apparent purpose in adopting it. Accordingly, we conclude that a gift or contribution is "for the use of" a qualified organization when it is held in a legally enforceable trust for the qualified organization or in a similar legal arrangement.

Viewing the record here in the light most favorable to petitioners, as we must after a grant of summary judgment for the United States, we discern no evidence that petitioners

transferred funds to their sons "in trust for" the Church. It is undisputed that petitioners transferred the money to their sons' personal bank accounts on which the sons were the sole authorized signatories. Nothing in the record indicates that petitioners took any steps normally associated with creating a trust or similar legal arrangement. Although the sons may have promised to use the money "in accordance with Church guidelines," see App. to Pet. for Cert. 36a, they did not have any legal obligation to do so; there is no evidence that the guidelines have any legally binding effect. Nor does the record support the assertion, see Tr. of Oral Arg. 19–20, that the Church might have a legal entitlement to the money or a civil cause of action against missionaries who used their parents' money for purposes not approved by the Church. We conclude that, because petitioners did not donate the funds in trust for the Church, or in a similarly enforceable legal arrangement for the benefit of the Church, the funds were not donated "for the use of" the Church for purposes of § 170.

III

Petitioners contend, in the alternative, that their transfer of funds into their sons' account was a contribution "to" the Church under Treas. Reg. § 1.170A–1(g), 26 CFR § 1.170A–1(g) (1989), which provides:

> "*Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of perform-

> ing donated services also are deductible. For the purposes of this paragraph, the phrase 'while away from home' has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder."

Petitioners assert that this regulation allows them to claim deductions for their sons' unreimbursed expenditures incident to their sons' contribution of services. We disagree. The plain language of § 1.170A–1(g) indicates that taxpayers may claim deductions only for expenditures made in connection with their own contributions of service to charities. Unless there is a specific statutory provision to the contrary, a taxpayer ordinarily reports his own income and takes his own deductions. See, *e. g.*, *Commissioner* v. *Culbertson*, 337 U. S. 733, 739–740 (1949) ("[T]he first principle of income taxation [is] that income must be taxed to him who earns it"); *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440–441 (1934) ("[T]axpayer who sustain[s] the loss is the one to whom the deduction shall be allowed"). Section 1.170A–1(g) is thus most naturally read as referring to the individual taxpayer, who may deduct only those "unreimbursed expenditures" incurred in connection with the taxpayer's own "rendition of services to [a qualified] organization." This interpretation of the regulation is consistent with the Revenue Ruling that was the precursor to § 1.170A–1(g). See Rev. Rul. 55–4, 1955–1 Cum. Bull. 291 ("A taxpayer who gives his services gratuitously to an association, contributions to which are deductible under [§ 170] and who incurs unreimbursed traveling expenses . . . may deduct the amount of such unreimbursed expenses in computing his net income . . ."). It would strain the language of the regulation to read it, as petitioners suggest, as allowing a deduction for expenses made incident to a third party's rendition of services rather than to the taxpayer's own contribution of services. Similarly, the taxpayer is clearly intended to be the subject of the other provisions in the regulation. For example, it is most natural to read the regulation as referring to a taxpayer who incurs

expenditures for meals and lodging while away from his home, not while a third party is away from *his* home.

Petitioners' interpretation not only strains the language of the statute, but would also allow manipulation of § 1.170A–1(g) for tax evasion purposes. See Note, Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction, 83 Mich. L. Rev. 1428, 1434–1435 (1985); *Brinley* v. *Commissioner*, 782 F. 2d, at 1338 (Hill, J. dissenting). For example, parents might be tempted to transfer funds to their children in amounts greater than needed to reimburse reasonable expenses incurred in donating services to a charity. Parents and children might attempt to claim a deduction for the same expenditure. Controlling such abuses would place a heavy administrative burden on the Service, which would not only have to monitor the taxpayer's records, but also correlate them with the records of the third party. To the extent petitioners' interpretation lessens the likelihood that claimed charitable contributions actually served a charitable purpose, it is inconsistent with § 170.

Petitioners cite judicial decisions that allowed taxpayers to claim deductions for the expenses of third parties who assisted the taxpayers in rendering services to qualified organizations. See, *e. g.*, *Rockefeller* v. *Commissioner*, 676 F. 2d 35 (CA2 1982); *McCollum* v. *Commissioner*, 37 TCM 1817 (1978); *Smith* v. *Commissioner*, 60 T. C. 988 (1973). These cases are inapposite, as petitioners do not claim that they were independently rendering services to the Church, assisted by their sons.

We conclude that § 1.170A–1(g) does not allow taxpayers to claim a deduction for expenses not incurred in connection with the taxpayers' own rendition of services to a qualified organization. Therefore, petitioners are not entitled to a deduction under § 1.170A–1(g).

Petitioners also assert that because their sons are agents of the Church authorized to receive payments to support their

own missionary efforts, payments made to their sons are payments to the Church. Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here. See, *e. g.*, *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981); *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980).

Accordingly, we hold that petitioners' transfer of funds into their sons' accounts was not a contribution "to or for the use of" the Church for purposes of § 170. The judgment of the Court of Appeals is

Affirmed.

CALIFORNIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.

CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89–333. Argued March 20, 1990—Decided May 21, 1990

Pursuant to the Federal Power Act (FPA), respondent Federal Energy Regulatory Commission (FERC) issued a license authorizing the operation in California of a hydroelectric project, which draws, and releases a mile later, water from Rock Creek to drive its generators. After considering the project's economic feasibility and environmental consequences, FERC set an interim "minimum flow rate" of water that must remain in the bypassed section of the stream and thus remains unavailable to drive the generators. The State Water Resources Control Board (WRCB) issued a state water permit that conformed to FERC's interim minimum requirements, but reserved the right to set different permanent ones. When WRCB later considered a draft order requiring permanent minimum flow rates well in excess of the FERC rates, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project's minimum flow rates. FERC ordered the licensee to comply with the federal permit's rates, concluding that the task of setting such rates rested within its exclusive jurisdiction. It reasoned that setting the rates was integral to its planning and licensing process under the FPA, and that giving effect to competing state requirements would interfere with its balancing of competing considerations in licensing and would vest in States a veto power over federal projects inconsistent with the FPA, as interpreted in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152. WRCB adopted the higher flow requirements and intervened seeking a rehearing of FERC's order. FERC denied the request, concluded that the State sought to impose conflicting license requirements, and reaffirmed its conclusion that it had exclusive jurisdiction to determine the rates. The Court of Appeals affirmed, concluding that FPA § 27—which saves from supersedure state "laws . . . relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or *other uses*, or any vested right acquired therein"—as construed in *First Iowa*, did not preserve the State's right to regulate minimum flow rates, and that the FPA pre-empted WRCB's minimum flow rate requirements.

Held: The California requirements for minimum stream flows cannot be given effect and allowed to supplement the federal flow requirements. Pp. 496–507.

(a) Were the meaning of § 27 and the pre-emptive effect of the FPA matters of first impression, the State's argument that the stream flow requirement might relate to a use encompassed by § 27—the generation of power or protection of fish—could be said to present a close question. However, *First Iowa* has previously construed § 27, holding that it is limited to laws relating to the control, appropriation, use, or distribution of water in irrigation or for municipal or *other uses of the same nature*, and has primary, if not exclusive, reference to such *proprietary* rights. Such rights are not implicated in the instant case. California's request that *First Iowa*'s interpretation be repudiated misconceives the deference the Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. There has been no sufficient intervening change in the law, or indication that *First Iowa* has proved unworkable or has fostered confusion and inconsistency in the law, that warrants a departure from established precedent. *First Iowa*'s limited reading of § 27 has been endorsed, see *FPC* v. *Oregon*, 349 U. S. 435, and the decision has been employed with approval in a range of cases. In addition, Congress has amended the FPA to elaborate and reaffirm *First Iowa*'s understanding that the FPA establishes a broad and paramount federal regulatory role. Pp. 496–500.

(b) *First Iowa*'s narrow reading of § 27 was not dictum, but was necessary for and integral to the Court's conclusion that FPA § 9(b)—which governs submission to the federal licensing agency of evidence of compliance with state law—did not require licensees to obtain a state permit or to demonstrate compliance with the state law prerequisites to obtaining such a permit, but rather merely authorized the federal agency to require evidence of actions consistent with the federal permit. A broad interpretation of § 27 would have "saved" the state licensing requirements and would have created concurrent jurisdiction of state and federal authorities over the same subject matter. Pp. 500–503.

(c) Although *California* v. *United States*, 438 U. S. 645, construed § 8 of the Reclamation Act of 1902—which is similar to, and served as a model for, FPA § 27—in a manner more generous to the States' regulatory powers than was *First Iowa*'s reading of § 27, it bears quite indirectly, at best, upon the FPA's interpretation. In interpreting the Reclamation Act, the Court did not advert to or purport to interpret the FPA, and held simply that § 8 requires the Secretary of the Interior to comply with state laws governing the use of water employed in federal reclamation projects. The purpose, structure, and legislative history of

the two statutes show that the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act. Even if the two saving clauses were properly viewed in isolation from the remainder of their respective Acts, § 8 explicitly directs that the Secretary "shall proceed in conformity with such [state] laws," language which has no counterpart in § 27 and which was crucial to the Court's interpretation of § 8. Pp. 503–505.

(d) Section 27's legislative history does not require abandonment of *First Iowa*'s interpretation, because a quite natural reading of the statutory language has failed to displace an intervening decision providing a contrary interpretation; because *First Iowa* expressly considered the history and found it to support the Court's interpretation of the FPA and § 27; because it is only tangentially related to the issue at hand; and because strong interests support adherence to *First Iowa*. Pp. 505–506.

(e) The FPA and the federal license conditions established pursuant to the Act pre-empt the California stream flow requirements. The State's requirements conflict with FERC's licensing authority and with the balance struck by the federal license condition. Pp. 506–507.

877 F. 2d 743, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Roderick E. Walston, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Clifford T. Lee*, Deputy Attorney General.

Stephen L. Nightingale argued the cause for respondents. With him on the brief for respondent Federal Energy Regulatory Commission were *Solicitor General Starr*, *Deputy Solicitor General Merrill*, *Jerome M. Feit*, *Joseph S. Davies*, and *Raymond E. Hagenlock*. *Louis Touton* and *Erwin N. Griswold* filed a brief for respondent Rock Creek Limited Partnership.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Jim Jones*, Attorney General, and *Clive J. Strong*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Douglas B. Baily* of Alaska, *Robert K. Corbin* of Arizona, *Steve Clark* of Arkansas, *Duane Woodard* of Colorado, *Clarine Nardi Riddle* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia,

JUSTICE O'CONNOR delivered the opinion of the Court.

This case concerns overlapping federal and state regulation of a hydroelectric project located near a California stream. California seeks to ensure that the project's operators maintain water flowing in the stream sufficient, in the State's judgment, to protect the stream's fish. The Federal Government claims the exclusive authority to set the minimum stream flows that the federally licensed powerplant must maintain. Each side argues that its position is consistent with the Federal Power Act, ch. 285, 41 Stat. 1063, as

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Warren Price III of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Tom Miller* of Iowa, *Robert T. Stephan* of Kansas, *Frederic J. Cowan* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *James M. Shannon* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *John P. Arnold* of New Hampshire, *Peter N. Perretti, Jr.*, of New Jersey, *Hal Stratton* of New Mexico, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert H. Henry* of Oklahoma, *Dave Frohnmayer* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *Charles W. Burson* of Tennessee, *Jim Mattox* of Texas, *Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Roger Tompkins* of West Virginia, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; for American Rivers et al. by *Steven W. Weston;* and for the Council of State Governments et al. by *Benna Ruth Solomon* and *Richard J. Lazarus.*

Briefs of *amici curiae* urging affirmance were filed for the City of Klamath Falls, Oregon, by *Edward Weinberg* and *Richmond F. Allan;* for the Edison Electric Institute et al. by *Jerome C. Muys, Peter Kelsey, Robert L. McCarty, Wallace F. Tillman,* and *William J. Madden;* for the Modesto Irrigation District et al. by *Joel S. Moskowitz* and *Gregory J. Kerwin;* for Pacific Gas and Electric Company et al. by *Jack F. Fallin, Jr., Howard V. Golub, Thomas H. Nelson,* and *Jody L. Williams;* and for Pacific Northwest Utilities by *Jay T. Waldron.*

Antonio Cosby-Rossmann filed a brief for the County of Inyo et al. as *amici curiae.*

amended, 16 U. S. C. § 791a *et seq.* (1982 ed.), and, in particular, with § 27 of that Act. We granted certiorari to resolve these competing claims.

I

The Rock Creek hydroelectric project lies near the confluence of the South Fork American River and one of the river's tributaries, Rock Creek. Rock Creek runs through federally managed land located within California. The project draws water from Rock Creek to drive its generators and then releases the water near the confluence of the stream and river, slightly less than one mile from where it is drawn. The state and federal requirements at issue govern the "minimum flow rate" of water that must remain in the bypassed section of the stream and that thus remains unavailable to drive the generators.

In 1983, pursuant to the Federal Power Act (FPA or Act), the Federal Energy Regulatory Commission (FERC) issued a license authorizing the operation of the Rock Creek project. *Keating*, 23 FERC ¶ 62,137. Section 4(e) of the FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U. S. C. § 797(e) (1982 ed.). Section 10(a) of the Act also authorizes FERC to issue licenses subject to the conditions that FERC deems best suited for power development and other public uses of the waters. 16 U. S. C. § 803(a) (1982 ed.). Congress' subsequent amendments to those provisions expressly direct that FERC consider a project's effect on fish and wildlife as well as "power and development purposes." Electric Consumers Protection Act of 1986, Pub. L. 99–495, 100 Stat. 1243, 16 U. S. C. §§ 797(e), 803(a)(1). FERC issued the 1983 license and set minimum flow rates after considering the project's economic feasibility and environmental consequences. In part to protect trout in the stream, the license

required that the project maintain interim minimum flow rates of 11 cubic feet per second (cfs) during May through September and 15 cfs during the remainder of the year. 23 FERC ¶62,137, at 63,204. The license also required the licensee to submit studies recommending a permanent minimum flow rate, after consulting with federal and state fish and wildlife protection agencies. *Ibid.* In 1985, the licensee submitted a report recommending that FERC adopt the interim flow rates as permanent rates. The California Department of Fish and Game (CDFG) recommended that FERC require significantly higher minimum flow rates.

The licensee had also applied for state water permits, and in 1984 the State Water Resources Control Board (WRCB) issued a permit that conformed to FERC's interim minimum flow requirements but reserved the right to set different permanent minimum flow rates. App. 65–67. When the WRCB in 1987 considered a draft order requiring permanent minimum flow rates of 60 cfs from March through June and 30 cfs during the remainder of the year, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project's minimum flow requirements. *Rock Creek Limited Partnership*, 38 FERC ¶61,240, p. 61,772 (1987). The licensee, by then respondent Rock Creek Limited Partnership, also claimed that the higher minimum flow rates sought by the WRCB would render the project economically infeasible. *Ibid.*

In March 1987, FERC issued an order directing the licensee to comply with the minimum flow requirements of the federal permit. In that order, FERC concluded that the task of setting minimum flows rested within its exclusive jurisdiction. *Id.*, at 61,774. The Commission reasoned that setting minimum flow requirements was integral to its planning and licensing process under FPA § 10(a); giving effect to competing state requirements "would interfere with the Commission's balancing of competing considerations in licensing" and would vest in States a veto power over federal

projects inconsistent with the FPA, as interpreted in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152 (1946). 38 FERC, at 61,773. FERC also directed an Administrative Law Judge to hold a hearing to determine the appropriate permanent minimum flow rates for the project. *Id.*, at 61,774. After considering proposals and arguments of the licensee, the CDFG, and FERC staff, the Administrative Law Judge set the minimum flow rate for the project at 20 cfs during the entire year. *Rock Creek Limited Partnership*, 41 FERC ¶63,019 (1987). Four days after FERC's declaratory order, the WRCB issued an order directing the licensee to comply with the higher minimum flow requirements contained in its draft order. App. 73. The WRCB also intervened to seek a rehearing of FERC's order. FERC denied the rehearing request, concluded that the State sought to impose conflicting license requirements, and reaffirmed its conclusion that the FPA, as interpreted in *First Iowa*, provided FERC with exclusive jurisdiction to determine minimum flow rates. *Rock Creek Limited Partnership*, 41 FERC ¶61,198 (1987).

The Court of Appeals for the Ninth Circuit affirmed FERC's order denying rehearing. *California ex rel. State Water Resources Board* v. *FERC*, 877 F. 2d 743 (1989). That court, too, concluded that *First Iowa* governed the case; that FPA §27 as construed in *First Iowa* did not preserve California's right to regulate minimum flow rates; and that the FPA pre-empted WRCB's minimum flow rate requirements. *Ibid.* We granted certiorari, 493 U. S. 991 (1989), and we now affirm.

II

In the Federal Power Act of 1935, 49 Stat. 863, Congress clearly intended a broad federal role in the development and licensing of hydroelectric power. That broad delegation of power to the predecessor of FERC, however, hardly determines the extent to which Congress intended to have the Federal Government exercise exclusive powers, or intended

to pre-empt concurrent state regulation of matters affecting federally licensed hydroelectric projects. The parties' dispute regarding the latter issue turns principally on the meaning of § 27 of the FPA, which provides the clearest indication of how Congress intended to allocate the regulatory authority of the States and the Federal Government. That section provides:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U. S. C. § 821 (1982 ed.).

Were this a case of first impression, petitioner's argument based on the statute's language could be said to present a close question. As petitioner argues, California's minimum stream flow requirement might plausibly be thought to "relat[e] to the control, appropriation, use, or distribution of water used . . . for . . . other uses," namely the generation of power or the protection of fish. This interpretation would accord with the "presumption against finding pre-emption of state law in areas traditionally regulated by the States" and "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California* v. *ARC America Corp.*, 490 U. S. 93, 101 (1989), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see *California* v. *United States*, 438 U. S. 645, 653–663 (1978) (tracing States' traditional powers over exploitation of water). Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme.

But the meaning of § 27 and the pre-emptive effect of the FPA are not matters of first impression. Forty-four

years ago, this Court in *First Iowa* construed the section and provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects. The Court interpreted § 27 as follows:

> "The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*. It therefore has primary, if not exclusive, reference to such *proprietary rights*. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *First Iowa*, 328 U. S., at 175–176 (emphasis added).

The Court interpreted § 27's reservation of limited powers to the States as part of the congressional scheme to divide state from federal jurisdiction over hydroelectric projects and, "in those fields where rights are not thus 'saved' to the States . . . to let the supersedure of the state laws by federal legislation take its natural course." *Id.*, at 176.

We decline at this late date to revisit and disturb the understanding of § 27 set forth in *First Iowa*. As petitioner prudently concedes, Tr. of Oral Arg. 7, *First Iowa*'s interpretation of § 27 does not encompass the California regulation at issue: California's minimum stream flow requirements neither reflect nor establish "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *First Iowa*, *supra*, at 176; see *Fullerton* v. *State Water Resources Control Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979); accord, *California Trout, Inc.* v. *State Water Resources Control Board*, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979). Instead, pe-

titioner requests that we repudiate *First Iowa*'s interpretation of § 27 and the FPA. This argument misconceives the deference this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). There has been no sufficient intervening change in the law, or indication that *First Iowa* has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent. Cf. *id.*, at 173. This Court has endorsed and applied *First Iowa*'s limited reading of § 27, see *FPC* v. *Oregon*, 349 U. S. 435 (1955); cf. *FPC* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239 (1954), and has employed the decision with approval in a range of decisions, both addressing the FPA and in other contexts. See, *e. g.*, *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 338, n. 6 (1982); *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U. S. 765, 773 (1984); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320, 334 (1958); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 223, n. 34 (1983). By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with final authority to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA to elaborate and reaffirm *First Iowa*'s understanding that the FPA establishes a broad and paramount federal regulatory role. See 16 U. S. C. §§ 803(a)(1)–(3) (FERC to issue license on conditions that protect fish and wildlife, after considering

recommendations of state agencies), as amended by the Electric Consumers Protection Act of 1986, 16 U. S. C. §§ 803(j)(1)–(2) (FERC license conditions protecting fish and wildlife to be based on recommendations of federal and state wildlife agencies, with FERC to issue findings if it adopts conditions contrary to recommendations); cf. *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) ("We are especially reluctant to reject this presumption [of adherence to precedent] in an area that has seen careful, intense, and sustained congressional attention").

Petitioner asks this Court fundamentally to restructure a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process. That departure would be inconsistent with the measured and considered change that marks appropriate adjudication of such statutory issues. See *Square D Co.*, *supra*, at 424 (for statutory determinations, "'it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation,'" quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)).

Petitioner also argues that we should disregard *First Iowa*'s discussion of § 27 because it was merely dictum. It is true that our immediate concern in *First Iowa* was the interpretation of § 9(b) of the FPA, which governs submission to the federal licensing agency of evidence of compliance with state law.[1] The Court determined that § 9(b) did not require

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[1] Section 9(b), 16 U. S. C. § 802(a)(2) (formerly 16 U. S. C. § 802(b) (1982 ed.)), provides:

"(a) Each applicant for a license under this chapter shall submit to the commission—

. . . . . .

"(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed

licensees to obtain a state permit or to demonstrate compliance with the state law prerequisites to obtaining such a permit. *First Iowa*, 328 U. S., at 163–164, 167, 177. Instead, the Court construed the section merely as authorizing the federal agency to require evidence of actions consistent with the federal permit. *Id.*, at 167–169, 177–179. *First Iowa*'s limited reading of § 27 was, however, necessary for, and integral to, that conclusion. Like this case, *First Iowa* involved a state permit requirement that related to the control of water for particular uses but that did not relate to or establish proprietary rights. Iowa had required as one condition of securing a state permit that diverted water be "returned . . . at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life," Iowa Code § 7771 (1939), a provision the Court found to conflict with the federal requirements and to "strik[e] at the heart of the present project." *First Iowa*, 328 U. S., at 166–167, 170–171. The Court reasoned that, absent an express congressional command, § 9(b) could not be read to require compliance with, and thus to preserve, state laws that conflicted with and were otherwise pre-empted by the federal requirements. See *id.*, at 166–167 ("If a state permit is not required, there is no justification for requiring the petitioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit"); *id.*, at 177. Only the Court's narrow reading of § 27 allowed it to sustain this interpretation of § 9(b). Had § 27 been given the broader meaning that Iowa sought, it would have "saved" the state requirements at issue, made the state permit one that could be issued, and supported the interpretation of § 9(b) as

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project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

requiring evidence of compliance with those state requirements, rather than compliance only with those requirements consistent with the federal license.

The Court's related, but more general, rationale for its reading of § 9(b) in *First Iowa* also necessarily rested on its narrow construction of § 27. The Court framed the issue as whether the Act allowed the States to regulate through permit requirements such as Iowa's "the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission." *Id.*, at 165 (footnote citing FPA § 10(a) omitted). The Court rejected the possibility of concurrent jurisdiction and interpreted the FPA as mandating divided powers and "a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." *Id.*, at 171; see *id.*, at 174 (no "divided authority over any one subject"); *id.*, at 181 (comprehensive federal role "leave[s] no room or need for conflicting state controls"). Section 9 reflected the operation of this exclusive federal authority. See *id.*, at 167–169; *id.*, at 168 ("Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority"). In accord with this view, the Court interpreted § 9(b) as requiring compliance only with state measures relevant to federal requirements rather than, as would exist under a system of concurrent jurisdiction, compliance with the state requirements necessary to secure the state permit. *Id.*, at 167–169. Instead, only § 27 preserved and defined the States' exclusive regulatory sphere. *Id.*, at 175–178. That is, the Court rejected an interpretation of § 9(b) that would have "saved" or accommodated the state permit system and its underlying requirements. To reach its interpretation of § 9(b), however, the Court had to interpret § 27 consistently with the limited state regulatory sphere and in a manner that did not, by "saving" the Iowa requirements, establish "divided authority over any one subject." *Id.*, at 174. Con-

stricting § 27 to encompass only laws relating to proprietary rights, and thus leaving the permit requirements at issue to the federal sphere, accomplished that goal. The Court's discussion immediately after its extended discussion of § 27 illustrates the relation between the sections. Before distinguishing § 27's role in saving state law from § 9(b)'s role in the sphere of exclusive federal regulation, the Court concluded:

> "[Section 27] is therefore thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." *Id.*, at 176.

The Court's interpretation of § 9(b), of course, rested on that supersedure and required that the remaining field "saved" to the States by § 27 be limited correspondingly.

Petitioner also argues that our decision in *California* v. *United States*, 438 U. S. 645 (1978), construing § 8 of the Reclamation Act of 1902,[2] requires that we abandon *First Iowa*'s interpretation of § 27 and the FPA. Petitioner reasons that § 8 is similar to, and served as a model for, FPA § 27, that this Court in *California* v. *United States* interpreted § 8 in a manner inconsistent with *First Iowa*'s reading of § 27, and that that reading of § 8, subsequent to *First Iowa*, in some manner overrules or repudiates *First Iowa*'s understanding of § 27.

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[2] Section 8 of the Reclamation Act of 1902, 32 Stat. 390, now 43 U. S. C. §§ 372, 383 (1982 ed.), provided in part:

"[N]othing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof . . . ."

California v. *United States* is cast in broad terms and embodies a conception of the States' regulatory powers in some tension with that set forth in *First Iowa*, but that decision bears quite indirectly, at best, upon interpretation of the FPA. The Court in *California* v. *United States* interpreted the Reclamation Act of 1902; it did not advert to, or purport to interpret, the FPA, and held simply that § 8 requires the Secretary of the Interior to comply with state laws, not inconsistent with congressional directives, governing use of water employed in federal reclamation projects. *California* v. *United States*, *supra*. Also, as in *First Iowa*, the Court in *California* v. *United States* examined the purpose, structure, and legislative history of the entire statute before it and employed those sources to construe the statute's saving clause. See 438 U. S., at 649–651, 653–670, 674–675. Those sources indicate, of course, that the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act. Compare FPA §§ 4, 9, 10, as codified, 16 U. S. C. §§ 797, 802, 803, and *First Iowa*, 328 U. S., at 164, 167–169, 171–174, 179–181, with Reclamation Act of 1902 §§ 1, 2, 32 Stat. 388, as codified, 43 U. S. C. §§ 391, 411 (1982 ed.), and *California* v. *United States*, *supra*, at 649–651, 663–670.

Even if the two saving clauses were properly viewed in isolation from the remainder of their respective Acts and resulting regulatory schemes, significant differences exist between them. Section 8 of the Reclamation Act, after referring to state water laws relating to water used in irrigation and preserved by the Act, contains an explicit direction that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such [state] laws." 43 U. S. C. § 383 (1982 ed.). This language has no counterpart in § 27 of the FPA and was crucial to the Court's interpretation of § 8. See *California* v. *United States*, *supra*, at 650, 664–665, 674–675. Although *California* v. *United States* and *First Iowa* accord different effect to laws relating

to water uses, this difference stems in part from the different roles assumed by the federal actor in each case, as reflected in § 8's explicit directive to the Secretary. The Secretary in executing a particular reclamation project is in a position analogous to a licensee under the FPA and need not comply with state laws conflicting with congressional directives respecting particular reclamation projects, see 438 U. S., at 672–674; similarly, a federal licensee under the FPA need not comply with state requirements that conflict with the federal license provisions established pursuant to the FPA's directives. An additional textual difference is that § 8 refers only to "water used in irrigation" and contains no counterpart to § 27's reference to "other uses," the provision essential to petitioner's argument. Laws controlling water used in irrigation relate to proprietary rights, as the *First Iowa* Court indicated, 328 U. S., at 176, and n. 20, and § 8 does not indicate the appropriate treatment of laws relating to other water uses that do not implicate proprietary rights.

Given these differences between the statutes and saving provisions, it should come as no surprise that *California* v. *United States* did not refer either to § 27 or to *First Iowa*. Since the Court decided *California* v. *United States*, we have continued to cite *First Iowa* with approval. See, *e. g.*, *Escondido Mut. Water Co.*, 466 U. S., at 773; *Pacific Gas & Electric Co.*, 461 U. S., at 223, n. 34; *New England Power Co.*, 455 U. S., at 338, n. 6. We do not believe that *California* v. *United States* requires that we disavow *First Iowa* in this case.

Finally, petitioner argues that § 27's legislative history requires us to abandon *First Iowa*'s interpretation of that section. Whatever the usefulness of legislative history for statutory interpretation in the usual case, that source provides petitioner with no aid. If a quite natural reading of the statutory language fails to displace an intervening decision providing a contrary interpretation, legislative history supporting that reading and by definition before the Court that

has already construed the statute provides little additional reason to overturn the decision. Cf. *Patterson*, 491 U. S., at 172–174 (reviewing sources most likely to prompt overruling of decision). Indeed, *First Iowa* expressly considered the legislative history of the FPA and of § 27 in particular and found that source to support its interpretation of both. *First Iowa*, *supra*, at 171–174, 176, n. 20, 179. Given the tangential relation of the legislative history to the issue at hand and the interests supporting adherence to *First Iowa*, we decline to parse again the legislative history to determine whether the Court in *First Iowa* erred in its understanding of the development, as well as the meaning, of the statute.

Adhering to *First Iowa*'s interpretation of § 27, we conclude that the California requirements for minimum instream flows cannot be given effect and allowed to supplement the federal flow requirements. A state measure is "pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984) (citations omitted). As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. See *Rock Creek Limited Partnership*, 41 FERC ¶ 63,019 (1987); *Keating*, 23 FERC ¶ 62,137 (1983); see also *Rock Creek Limited Partnership*, 41 FERC ¶ 61,198 (1987). Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional in-

tent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC." 877 F. 2d, at 749; cf. *First Iowa*, *supra*, at 164–165.

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit is

Affirmed.

GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY *v.* CORBIN

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 89–474. Argued March 21, 1990—Decided May 29, 1990

After respondent Corbin's automobile struck oncoming vehicles on a New York highway, causing the death of one person and injury to another, he was served with two uniform traffic tickets directing him to appear at a Town Justice Court. One ticket charged him with the misdemeanor of driving while intoxicated, and the other charged him with failing to keep to the right of the median. When Corbin pleaded guilty to the traffic tickets in the Town Justice Court, the presiding judge was not informed of the fatality or of a pending homicide investigation. Subsequently, a grand jury indicted Corbin, charging him with, among other things, reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. A bill of particulars identified the three reckless or negligent acts on which the prosecution would rely to prove the charges: (1) operating a motor vehicle on a public highway in an intoxicated condition; (2) failing to keep right of the median; and (3) driving at a speed too fast for the weather and road conditions. Corbin's motion to dismiss the indictment on, *inter alia*, constitutional double jeopardy grounds was denied by the County Court. He then sought a writ of prohibition barring prosecution, which was denied by the Appellate Division. However, the State Court of Appeals reversed, finding that the State's intention to "rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges" violated this Court's "pointed" dictum in *Illinois* v. *Vitale*, 447 U. S. 410, that if two successive prosecutions were not barred by the test of *Blockburger* v. *United States*, 284 U. S. 299, 304, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution.

Held: The Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Pp. 515–524.

(a) To determine whether a subsequent prosecution is barred, a court must first apply the traditional *Blockburger* test. If the test's application reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. However, a technical com-

parison of the elements of the two offenses as required by the *Blockburger* test—which was developed in the context of multiple punishments imposed in a single prosecution—does not protect defendants sufficiently from the burdens of multiple trials, see, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, and, thus, is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause. See, *e. g.*, *Harris* v. *Oklahoma*, 433 U. S. 682. Successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence. They allow the State to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity. They also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. Were *Blockburger* the exclusive test in the context of successive prosecutions, the State could try Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. Pp. 515–521.

(b) The critical inquiry in determining whether the government will prove conduct in the subsequent prosecution that constitutes an offense for which the defendant has already been prosecuted is what conduct the State will prove, not the evidence the State will use to prove it. Thus, the test is not an "actual evidence" or "same evidence" test. While the presentation of specific evidence in one trial does not forever prevent the government from introducing the same evidence in a subsequent proceeding, see *Dowling* v. *United States*, 493 U. S. 342, a State cannot avoid the Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct. Pp. 521–522.

(c) Applying this analysis to the instant facts is straightforward. While *Blockburger* does not bar prosecution of the reckless manslaughter, criminally negligent homicide, and third-degree reckless assault charges against Corbin, the State, in its bill of particulars, has admitted that it will prove the entirety of the conduct for which Corbin was convicted to establish essential elements of these offenses. Thus, the Double Jeopardy Clause bars the prosecution. However, this holding would not bar a subsequent prosecution if the bill of particulars revealed that the State would rely solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence. Pp. 522–523.

(d) That drunken driving is a national tragedy and that prosecutors are overworked and may not always have the time to monitor seemingly minor cases as they wind through the judicial system do not excuse the need for scrupulous adherence to constitutional principles. With adequate preparation and foresight, the State could have prosecuted Corbin

for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding. P. 524.

74 N. Y. 2d 279, 543 N. E. 2d 714, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 524. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 526.

Bridget R. Steller argued the cause for petitioner. With her on the briefs was *William V. Grady, pro se.*

Richard T. Farrell argued the cause for respondent. With him on the brief were *Stephen L. Greller* and *Ilene J. Miller.*

JUSTICE BRENNAN delivered the opinion of the Court.

We have long held, see *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), that the Double Jeopardy Clause of the Fifth Amendment[1] prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not "requir[e] proof of a fact which the other does not." In *Illinois* v. *Vitale*, 447 U. S. 410 (1980), we suggested that even if two successive prosecutions were not barred by the *Blockburger* test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution. Today we adopt the suggestion set forth in *Vitale*. We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[2]

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[1] The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." It is enforceable against the States through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969).

[2] This issue has been raised before us twice in recent years without resolution. See *Fugate* v. *New Mexico*, 470 U. S. 904 (1985) (affirming by

I

For purposes of this proceeding, we take the following facts as true. At approximately 6:35 p.m. on October 3, 1987, respondent Thomas Corbin drove his automobile across the double yellow line of Route 55 in LaGrange, New York, striking two oncoming vehicles. Assistant District Attorney (ADA) Thomas Dolan was called to the scene, where he learned that both Brenda Dirago, who had been driving the second vehicle to be struck, and her husband Daniel had been seriously injured. Later that evening, ADA Dolan was informed that Brenda Dirago had died from injuries sustained in the accident. That same evening, while at the hospital being treated for his own injuries, respondent was served with two uniform traffic tickets directing him to appear at the LaGrange Town Justice Court on October 29, 1987. One ticket charged him with the misdemeanor of driving while intoxicated in violation of N. Y. Veh. & Traf. Law § 1192(3) (McKinney 1986); the other charged him with failing to keep right of the median in violation of § 1120(a). A blood test taken at the hospital that evening indicated a blood alcohol level of 0.19%, nearly twice the level at which it is *per se* illegal to operate a motor vehicle in New York. § 1192(2).

Three days later, ADA Frank Chase began gathering evidence for a homicide prosecution in connection with the accident. "Despite his active involvement in building a homicide case against [Corbin], however, Chase did not attempt to ascertain the date [Corbin] was scheduled to appear in Town Justice Court on the traffic tickets, nor did he inform either the Town Justice Court or the Assistant District Attorney covering that court about his pending investigation." *In re Corbin* v. *Hillery*, 74 N. Y. 2d 279, 284, 543 N. E. 2d 714, 716 (1989). Thus, ADA Mark Glick never mentioned Brenda

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an equally divided Court); *Thigpen* v. *Roberts*, 468 U. S. 27 (1984) (deciding on alternative grounds).

Dirago's death in the statement of readiness for trial and other pretrial pleadings he submitted to respondent and the LaGrange Town Justice Court on October 14, 1987. App. 5–10.

Accordingly, when respondent pleaded guilty to the two traffic tickets on October 27, 1987, a date on which no member of the District Attorney's office was present in court,[3] the presiding judge was unaware of the fatality stemming from the accident. Corbin was never asked if any others had been injured on the night in question and did not voluntarily incriminate himself by providing such information.[4] The

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[3] The record does not indicate why the return dates for the traffic tickets were changed from October 29 to October 27. In any event, the District Attorney was not deprived of a meaningful opportunity to participate in this prosecution. If the District Attorney had wanted to prevent Corbin from pleading guilty to the traffic tickets so that the State could combine all charges into a single prosecution containing the later-charged felony counts, he could have availed himself of N. Y. Crim. Proc. Law § 170.20(2) (McKinney 1982), which states:

"At any time before entry of a plea of guilty to or commencement of a trial of an accusatory instrument [containing a charge of misdemeanor], the district attorney may apply for an adjournment of the proceedings in the local criminal court upon the ground that he intends to present the misdemeanor charge in question to a grand jury with a view to prosecuting it by indictment in a superior court. In such case, the local criminal court must adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant such further adjournments for that purpose as are reasonable under the circumstances."

Furthermore, the District Attorney's participation in this prosecution amounted to more than a failure to move for an adjournment. ADA Glick filed papers indicating a readiness to proceed to trial, and ADA Heidi Sauter appeared at Corbin's sentencing on behalf of the People of the State of New York.

[4] The New York Court of Appeals held that, although an attorney may not misrepresent facts, "a practitioner representing a client at a traffic violation prosecution should not be expected to *volunteer* information that is likely to be highly damaging to his client's position." *In re Corbin* v. *Hillery*, 74 N. Y. 2d 279, 288, and n. 6, 543 N. E. 2d 714, 718, and n. 6 (1989) (emphasis in original). Be-

presiding judge accepted his guilty plea, but because the District Attorney's office had not submitted a sentencing recommendation, the judge postponed sentencing until November 17, 1987, when an ADA was scheduled to be present in court. The ADA present at sentencing on that date, Heidi Sauter, was unaware that there had been a fatality, was unable to locate the case file, and had not spoken to ADA Glick about the case. Nevertheless, she did not seek an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation. 74 N. Y. 2d, at 284, 543 N. E. 2d, at 716. Instead, she recommended a "minimum sentence,"[5] and the presiding judge sentenced Corbin to a $350 fine, a $10 surcharge, and a 6-month license revocation. App. 12.

Two months later, on January 19, 1988, a grand jury investigating the October 3, 1987, accident indicted Corbin, charging him with reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide for causing the death of Brenda Dirago; third-degree reckless assault for causing physical injury to Daniel Dirago; and driving while intoxicated. The prosecution filed a bill of particulars that

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cause the Court of Appeals refused to characterize as misconduct the behavior of either Corbin or his attorney, we need not decide whether our double jeopardy analysis would be any different if affirmative misrepresentations of fact by a defendant or his counsel were to mislead a court into accepting a guilty plea it would not otherwise accept.

[5] The Town Justice Court notes of the sentencing proceeding state:

"Atty: My client is willing to plea *[sic]* guilty and I request minimum sentence.

"Judge: Read charges. We will accept your plea of guilty. Any recommendation on sentence?

"Atty: Minimum sentence." App. 12.

The State contends that these notes indicate that the sentencing recommendation was made by respondent's counsel, not by ADA Sauter. We do not so interpret the notes, but even if this were an accurate interpretation, the record nevertheless establishes that ADA Sauter was present at the sentencing proceeding yet neither objected to a minimum sentence nor mentioned that the accident had resulted in a fatality.

identified the three reckless or negligent acts on which it would rely to prove the homicide and assault charges: (1) operating a motor vehicle on a public highway in an intoxicated condition, (2) failing to keep right of the median, and (3) driving approximately 45 to 50 miles per hour in heavy rain, "which was a speed too fast for the weather and road conditions then pending." App. 20. Respondent moved to dismiss the indictment on statutory and constitutional double jeopardy grounds. After a hearing, the Dutchess County Court denied respondent's motion, ruling that the failure of Corbin or his counsel to inform the Town Justice Court at the time of the guilty plea that Corbin had been involved in a fatal accident constituted a "material misrepresentation of fact" that "was prejudicial to the administration of justice."[6] App. to Pet. for Cert. 8c.

Respondent then sought a writ of prohibition barring prosecution on all counts of the indictment. The Appellate Division denied the petition without opinion, but the New York Court of Appeals reversed. The court prohibited prosecution of the driving while intoxicated counts pursuant to New York's statutory double jeopardy provision, N. Y. Crim. Proc. Law §40.20 (McKinney 1971 and Supp. 1970–1989). The court further ruled that prosecution of the two vehicular manslaughter counts would violate the Double Jeopardy Clause of the Fifth Amendment pursuant to the *Blockburger* test because, as a matter of state law, driving while intoxicated "is unquestionably a lesser included offense of second degree vehicular manslaughter." 74 N. Y. 2d, at 290, and n. 7, 543 N. E. 2d, at 720, and n. 7. Finally, relying on the "pointed dictum" in this Court's opinion in *Vitale*, the court barred prosecution of the remaining counts because the bill of particulars expressed an intention to "rely on the prior traffic

[6] The New York Court of Appeals found no misrepresentations and no misconduct during the guilty plea colloquy on October 27, 1987. 74 N. Y. 2d, at 287–288, and n. 6, 543 N. E. 2d, at 718–719, and n. 6. We accept its characterization of the proceedings. See n. 4, *supra*.

offenses as the acts necessary to prove the homicide and assault charges." 74 N. Y. 2d, at 289, 290, 543 N. E. 2d, at 719–720. Two judges dissented, arguing that respondent had deceived the Town Justice Court when pleading guilty to the traffic tickets. We granted certiorari, 493 U. S. 953 (1989), and now affirm.

II

The facts and contentions raised here mirror almost exactly those raised in this Court 10 years ago in *Illinois* v. *Vitale*, 447 U. S. 410 (1980). Like Thomas Corbin, John Vitale allegedly caused a fatal car accident. A police officer at the scene issued Vitale a traffic citation charging him with failure to reduce speed to avoid an accident in violation of § 11–601(a) of the Illinois Vehicle Code. Vitale was convicted of that offense and sentenced to pay a $15 fine. The day after his conviction, the State charged Vitale with two counts of involuntary manslaughter based on his reckless driving. Vitale argued that this subsequent prosecution was barred by the Double Jeopardy Clause.

This Court held that the second prosecution was not barred under the traditional *Blockburger* test because each offense "require[d] proof of a fact which the other [did] not." See *Blockburger*, 284 U. S., at 304. Although involuntary manslaughter required proof of a death, failure to reduce speed did not. Likewise, failure to slow was not a statutory element of involuntary manslaughter. *Vitale*, *supra*, at 418–419. Thus, the subsequent prosecution survived the *Blockburger* test.

But the Court did not stop at that point. JUSTICE WHITE, writing for the Court, added that, even though the two prosecutions did not violate the *Blockburger* test:

> "[I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that

> is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* [v. *Ohio*, 432 U. S. 161 (1977),] and our later decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977)." 447 U. S., at 420.

We believe that this analysis is correct and governs this case.[7] To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. *Brown* v. *Ohio*, 432 U. S. 161, 166 (1977).

The State argues that this should be the last step in the inquiry and that the Double Jeopardy Clause permits successive prosecutions whenever the offenses charged satisfy the *Blockburger* test. We disagree. The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969) (footnotes omitted). The *Blockburger* test was developed "in the context of multiple punishments imposed in a single prosecution." *Garrett* v. *United States*, 471 U. S. 773, 778 (1985). In that context, "the Double Jeopardy Clause does no more than prevent the sentencing court

[7] We recognized in *Brown* v. *Ohio*, 432 U. S. 161, 169, and n. 7 (1977), that when application of our traditional double jeopardy analysis would bar a subsequent prosecution, "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912); *Ashe* v. *Swenson*, [397 U. S. 436, 453, n. 7 (1970)] (BRENNAN, J., concurring)." Because ADA Dolan was informed of Brenda Dirago's death on the night of the accident, such an exception is inapplicable here.

from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U. S. 359, 366 (1983). See also *Brown*, *supra*, at 165. The *Blockburger* test is simply a "rule of statutory construction," a guide to determining whether the legislature intended multiple punishments.[8] *Hunter*, *supra*, at 366.

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[8] JUSTICE SCALIA's dissent contends that *Blockburger* is not just a guide to legislative intent, but rather an exclusive definition of the term "same offence" in the Double Jeopardy Clause. *Post*, at 528–530. To support this contention, JUSTICE SCALIA asserts that "[w]e have applied the [*Blockburger* test] in virtually every case defining the 'same offense' decided since *Blockburger*." *Post*, at 535–536. Every one of the eight cases cited in support of that proposition, however, describes *Blockburger* as a test to determine the permissibility of cumulative punishments. None of the cases even suggests that *Blockburger* is the exclusive definition of "same offence" in the context of successive prosecutions. See *Jones* v. *Thomas*, 491 U. S. 376, 380–381 (1989) (case involved Double Jeopardy Clause's protection against multiple punishments, not successive prosecutions); *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)* (describing *Blockburger* as a "rule for determining whether Congress intended to permit cumulative punishment"); *Ohio* v. *Johnson*, 467 U. S. 493, 499, n. 8 (1984) (*Blockburger* test determines "whether cumulative punishments may be imposed"); *Albernaz* v. *United States*, 450 U. S. 333, 337 (1981) ("[T]his Court has looked to the *Blockburger* rule to determine whether Congress intended that two statutory offenses be punished cumulatively"); *Whalen* v. *United States*, 445 U. S. 684, 691 (1980) (*Blockburger* relied on "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively"); *Simpson* v. *United States*, 435 U. S. 6, 11 (1978) (*Blockburger* established "the test for determining 'whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment' "), quoting *Brown* v. *Ohio*, *supra*, at 166; *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975) (*Blockburger* test used to identify "congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction"); *Gore* v. *United States*, 357 U. S. 386 (1958) (case involved imposition of multiple sentences in a single proceeding).

To further support its contention that *Blockburger* is the exclusive means of defining "same offence" within the meaning of the Double Jeopardy Clause, JUSTICE SCALIA's dissent relies on a lengthy historical discussion. *Post*, at 530–536. But this Court has not interpreted the Double Jeopardy Clause as JUSTICE SCALIA would interpret it since at least

Successive prosecutions, however, whether following acquittals or convictions,[9] raise concerns that extend beyond merely the possibility of an enhanced sentence:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States*, 355 U. S. 184, 187 (1957).

Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. See, *e. g.*, *Tibbs* v. *Florida*, 457 U. S. 31, 41 (1982) (noting that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction"); *Ashe* v. *Swenson*, 397 U. S. 436, 447 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, "what every good attorney would do–he refined his presentation in light of the turn of events at the first trial"); *Hoag* v. *New Jersey*, 356 U. S. 464 (1958) (after an alleged robber was acquitted, the State altered its presen-

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1889. See *infra*, at 519 (discussing *In re Nielsen*). We have not previously found, and we do not today find, history to be dispositive of double jeopardy claims. Compare *post*, at 532–533 (SCALIA, J., dissenting) (relying on *Turner's Case*, Kelyng 30, 84 Eng. Rep. 1068 (K. B.), decided in England in 1708, which held that a defendant acquitted of stealing from a homeowner could lawfully be prosecuted for stealing from the homeowner's servant during the same breaking and entering), with *Ashe* v. *Swenson*, 397 U. S. 436 (1970) (holding that the Double Jeopardy Clause prevents a defendant acquitted of robbing one participant at a poker game from being prosecuted for robbing any of the other participants at the same game).

[9] See, *e. g.*, *Ohio* v. *Johnson*, 467 U. S. 493, 498–499 (1984); *Ex parte Lange*, 18 Wall. 163, 169 (1874).

tation of proof in a subsequent, related trial–calling only the witness who had testified most favorably in the first trial–and obtained a conviction). Even when a State can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding.

Because of these independent concerns, we have not relied exclusively on the *Blockburger* test to vindicate the Double Jeopardy Clause's protection against multiple prosecutions. As we stated in *Brown* v. *Ohio:*

> "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." 432 U. S., at 166–167, n. 6.

Justice Powell, writing for the Court in *Brown*, provided two examples. In *Ashe* v. *Swenson*, *supra*, the Court had held that the Double Jeopardy Clause barred a prosecution for robbing a participant in a poker game because the defendant's acquittal in a previous trial for robbing a different participant in the same poker game had conclusively established that he was not present at the robbery. In *In re Nielsen*, 131 U. S. 176 (1889), the Court had held that a conviction for cohabiting with two wives over a 2½-year period barred a subsequent prosecution for adultery with one of the wives on the day following the end of that period. Although application of the *Blockburger* test would have permitted the imposition of consecutive sentences in both cases, the Double Jeopardy Clause nonetheless barred these successive prosecutions. *Brown*, *supra*, at 166–167, n. 6.

Furthermore, in the same Term we decided *Brown*, we reiterated in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), that a

strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause. In *Harris*, the defendant was first convicted of felony murder after his companion shot a grocery store clerk in the course of a robbery. The State then indicted and convicted him for robbery with a firearm. The two prosecutions were not for the "same offense" under *Blockburger* since, as a statutory matter, felony murder could be established by proof of any felony, not just robbery, and robbery with a firearm did not require proof of a death. Nevertheless, because the State admitted that "'it was necessary for all the ingredients of the underlying felony of Robbery with Firearms to be proved'" in the felony-murder trial, the Court unanimously held that the subsequent prosecution was barred by the Double Jeopardy Clause. *Harris*, *supra*, at 682–683, and n. (quoting Brief in Opposition 4). See also *Payne* v. *Virginia*, 468 U. S. 1062 (1984). As we later described our reasoning: "[W]e did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." *Vitale*, 447 U. S., at 420.

These cases all recognized that a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. This case similarly demonstrates the limitations of the *Blockburger* analysis. If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide.[10] Tr. of Oral Arg. 17–18. The State could improve its presentation of proof with each trial, assessing which witnesses

[10] The State recognizes that under state law it would have to prosecute all of the homicide charges in the same proceeding. Tr. of Oral Arg. 17.

gave the most persuasive testimony, which documents had the greatest impact, and which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense.

Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[11] This is not an "actual evidence" or "same evidence" test.[12] The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subse-

[11] Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense. See *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) ("When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one") (footnote omitted); cf. *Brown*, 432 U. S., at 168 (noting that it is irrelevant for the purposes of the Double Jeopardy Clause whether the conviction of the greater offense precedes the conviction of the lesser offense or vice versa).

[12] Terminology in the double jeopardy area has been confused at best. Commentators and judges alike have referred to the *Blockburger* test as a "same evidence" test. See, *e. g.*, Note, The Double Jeopardy Clause as a Bar to Reintroducing Evidence, 89 Yale L. J. 962, 965 (1980); *Ashe*, 397 U. S., at 448 (BRENNAN, J., concurring). This is a misnomer. The *Blockburger* test has nothing to do with the *evidence* presented at trial. It is concerned solely with the statutory elements of the offenses charged. A true "same evidence" or "actual evidence" test would prevent the government from introducing in a subsequent prosecution any evidence that was introduced in a preceding prosecution. It is in this sense that we discuss, and do not adopt, a "same evidence" or "actual evidence" test.

quent proceeding. See *Dowling* v. *United States*, 493 U. S. 342 (1990). On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct. For example, if two bystanders had witnessed Corbin's accident, it would make no difference to our double jeopardy analysis if the State called one witness to testify in the first trial that Corbin's vehicle crossed the median (or if nobody testified in the first trial because Corbin, as he did, pleaded guilty) and called the other witness to testify to the same conduct in the second trial.

Applying this analysis to the facts of this case is straightforward. Respondent concedes that *Blockburger* does not bar prosecution of the reckless manslaughter, criminally negligent homicide, and third-degree reckless assault offenses.[13] Tr. of Oral Arg. 25–26. The rest of our inquiry in this case is simplified by the bill of particulars filed by the State on January 25, 1988.[14] That statement of the prosecution's theory of

[13] Because the State does not contest the New York Court of Appeals' ruling that the driving while intoxicated and vehicular manslaughter charges are barred under state law and *Blockburger*, respectively, Pet. for Cert. 12; Tr. of Oral Arg. 18, we need decide only whether the Double Jeopardy Clause prohibits the State from prosecuting Corbin on the homicide and assault charges.

[14] Application of the test we adopt today will not depend, as JUSTICE SCALIA's dissent argues, on whether the indictment "happens to show that the same evidence is at issue" or whether the jurisdiction "happen[s] to require the prosecution to submit a bill of particulars that cannot be exceeded." *Post*, at 529–530. The Courts of Appeals, which long ago recognized that the Double Jeopardy Clause requires more than a technical comparison of statutory elements when a defendant is confronting successive prosecutions, have adopted an essential procedural mechanism for assessing double jeopardy claims prior to a second trial. All nine Federal Circuits which have addressed the issue have held that "when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses." *United States* v. *Ragins*, 840 F. 2d 1184, 1192 (CA4 1988) (collecting cases). This procedural mechanism will ensure that

proof is binding on the State until amended, 74 N. Y. 2d, at 290, 543 N. E. 2d, at 720, and the State has not amended it to date. Tr. of Oral Arg. 8. The bill of particulars states that the prosecution will prove the following:

> "[T]he defendant [(1)] operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood, [(2)] failed to keep right and in fact crossed nine feet over the median of the highway [,and (3) drove] at approximately forty-five to fifty miles an hour in heavy rain, which was a speed too fast for the weather and road conditions then pending . . . . By so operating his vehicle in the manner above described, the defendant was aware of and consciously disregarded a substantial and unjustifiable risk of the likelihood of the result which occurred. . . . By his failure to perceive this risk while operating a vehicle in a criminally negligent and reckless manner, he caused physical injury to Daniel Dirago and the death of his wife, Brenda Dirago." App. 20.

By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court of Appeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (*i. e.*, if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).[15]

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the test set forth today is in fact "implementable," *post*, at 529 (SCALIA, J., dissenting).

[15] Adoption of a "same transaction" test would bar the homicide and assault prosecutions even if the State were able to establish the essential ele-

III

Drunken driving is a national tragedy. Prosecutors' offices are often overworked and may not always have the time to monitor seemingly minor cases as they wind through the judicial system. But these facts cannot excuse the need for scrupulous adherence to our constitutional principles. See *Santobello* v. *New York*, 404 U. S. 257, 260 (1971) ("This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them"). With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question. We have concluded that the Double Jeopardy Clause of the Fifth Amendment demands application of the standard announced today, but we are confident that with proper planning and attention prosecutors will be able to meet this standard and bring to justice those who make our Nation's roads unsafe.

The judgment of the New York Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, dissenting.

I agree with much of what JUSTICE SCALIA says in his dissenting opinion. I write separately, however, to note that my dissent is premised primarily on my view that the incon-

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ments of those crimes without proving the conduct for which Corbin previously was convicted. The Court, however, has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." *Garrett* v. *United States*, 471 U. S. 773, 790 (1985). But see *Jones* v. *Thomas*, 491 U. S. 376, 388–389 (1989) (BRENNAN, J., joined by MARSHALL, J., dissenting) (maintaining that "the Double Jeopardy Clause requires, except in very limited circumstances, that all charges against a defendant growing out of a single criminal transaction be tried in one proceeding").

sistency between the Court's opinion today and *Dowling* v. *United States*, 493 U. S. 342 (1990), decided earlier this Term, indicates that the Court has strayed from a proper interpretation of the scope of the Double Jeopardy Clause.

In *Dowling*, we considered whether an eyewitness' testimony regarding a robbery for which Dowling had been acquitted was admissible at a second trial of Dowling for an unrelated robbery. The eyewitness had testified at the first trial that a man had entered her house "wearing a knitted mask with cutout eyes and carrying a small handgun" and that his mask had come off during a struggle, revealing his identity. *Id.*, at 344. Based on this evidence, Dowling had been charged with burglary, attempted robbery, assault, and weapons offenses, but was acquitted of all charges. At a second trial for an unrelated bank robbery, the Government attempted to use the witness' testimony to prove Dowling's identity as a robber. We held that the Double Jeopardy Clause did not bar the introduction of the evidence: Because the prior acquittal did not necessarily represent a jury determination that Dowling was not the masked man who had entered the witness' home, the testimony was admissible in the second trial to prove identity. *Id.*, at 348–352.

The Court's ruling today effectively renders our holding in *Dowling* a nullity in many circumstances. If a situation identical to that in *Dowling* arose after today's decision, a conscientious judge attempting to apply the test enunciated by the Court, *ante*, at 510, 521, would probably conclude that the witness' testimony was barred by the Double Jeopardy Clause. The record in *Dowling* indicated that the Government was offering the eyewitness testimony to establish the defendant's identity, "an essential element of an offense charged in [the subsequent] prosecution," *ante*, at 521, and that the testimony would likely "prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Ibid.* See App. in *Dowling* v. *United States*, O. T. 1989, No. 88–6025, pp. 15–29. Under the Court's rea-

soning, the Government's attempt to introduce the eyewitness testimony would bar the second prosecution of Dowling for bank robbery. As a practical matter, this means that the same evidence ruled admissible in *Dowling* is barred by *Grady*.

The Court's decision is also inconsistent with *Dowling*'s approach to longstanding rules of evidence. Although we declined in *Dowling* to adopt a reading of the Double Jeopardy Clause that would "exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible" under Federal Rule of Evidence 404(b) and other Federal Rules of Evidence, 493 U. S., at 348, the wide sweep of the Court's decision today casts doubt on the continued vitality of Rule 404(b), which makes evidence of "other crimes" admissible for proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In my view, *Dowling* correctly delineated the scope of the Double Jeopardy Clause's protection. Accordingly, the inconsistency between our decision in *Dowling* and the Court's decision today leads me to reject the Court's expansive interpretation of the Clause. I respectfully dissent.

JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST and JUSTICE KENNEDY join, dissenting.

The State of New York seeks to prosecute respondent a second time for the actions that he took at 6:35 p.m. on October 3, 1987. If the Double Jeopardy Clause guaranteed the right not to be twice put in jeopardy for the same conduct, it would bar this second prosecution. But that Clause guarantees only the right not to be twice put in jeopardy for the same *offense*, and has been interpreted since its inception, as was its common-law antecedent, to permit a prosecution based upon the same acts but for a different crime. The Court today holds otherwise, departing from clear text and clear precedent with no justification except the citation of dictum in a recent case (dictum that was similarly unsupported, and inconclusive to boot). The effects of this innova-

tion upon our criminal justice system are likely to be substantial. In practice, it will require prosecutors to observe a rule we have explicitly rejected in principle: that all charges arising out of a single occurrence must be joined in a single indictment. Because respondent is not being prosecuted for the same offense for which he was previously prosecuted, I would reverse the judgment.

I

The Double Jeopardy Clause, made applicable to the States by the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969), provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. It "'protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Burks* v. *United States*, 437 U. S. 1, 11 (1978), quoting *Green* v. *United States*, 355 U. S. 184, 187 (1957). In *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), we summarized the test for determining whether conduct violating two distinct statutory provisions constitutes the "same offence" for double jeopardy purposes:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres* v. *United States*, 220 U. S. 338, 342 [(1911)], and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433 [(1871)]: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defend-

ant from prosecution and punishment under the other.'" *Ibid.*

Blockburger furnishes, we have observed, the "established test" for determining whether successive prosecutions arising out of the same events are for the "same offence." *Brown* v. *Ohio*, 432 U. S. 161, 166 (1977). This test focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction. "If each [statute] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975); see also *Gore* v. *United States*, 357 U. S. 386 (1958); *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788–789 (1946).

We have departed from *Blockburger*'s exclusive focus on the statutory elements of crimes in only two situations. One occurs where a statutory offense expressly incorporates another statutory offense without specifying the latter's elements. For example, in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977) *(per curiam)*, we held that a conviction for felony murder based on a killing in the course of an armed robbery barred subsequent prosecution for the underlying robbery. Although the second prosecution would not have been barred under the *Blockburger* test (because on its face the Oklahoma felony-murder statute did not require proof of robbery, but only of *some* felony), the second prosecution was impermissible because it would again force the defendant to defend against the charge of robbery. The other situation in which we have relaxed the *Blockburger* "elements" test occurs where a second prosecution would require relitigation of factual issues that were necessarily resolved in the defendant's favor in the first prosecution. See *Ashe* v. *Swenson*, 397 U. S. 436 (1970).

Subject to the *Harris* and *Ashe* exceptions, I would adhere to the *Blockburger* rule that successive prosecutions under

two different statutes do not constitute double jeopardy if each statutory crime contains an element that the other does not, regardless of the overlap between the proof required for each prosecution in the particular case. That rule best gives effect to the language of the Clause, which protects individuals from being twice put in jeopardy "for the same *offence*," not for the same *conduct* or *actions*. "Offence" was commonly understood in 1791 to mean "transgression," that is, "the Violation or Breaking of a Law." Dictionarium Britannicum (Bailey ed. 1730); see also J. Kersey, A New English Dictionary (1702); 2 T. Sheridan, A General Dictionary of the English Language (1780); J. Walker, A Critical Pronouncing Dictionary (1791); 2 N. Webster, An American Dictionary of the English Language (1828). If the same conduct violates two (or more) laws, then each offense may be separately prosecuted. Of course, this is not to say that two criminal provisions create "distinct" offenses simply by appearing under separate statutory headings; but if each contains an element the other does not, *i. e.*, if it is possible to violate each one without violating the other, then they cannot constitute the "*same* offence."

Another textual element also supports the *Blockburger* test. Since the Double Jeopardy Clause protects the defendant from being "twice put in jeopardy," *i. e.*, made to stand trial (see, *e. g.*, *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Pa. 1788)), for the "same offence," it presupposes that sameness can be determined before the second trial. Otherwise, the Clause would have prohibited a second "conviction" or "sentence" for the same offense. A court can always determine, before trial, whether the second prosecution involves the "same offence" in the *Blockburger* sense, since the Constitution entitles the defendant "to be informed of the nature and cause of the accusation." Amdt. 6. But since the Constitution does not entitle the defendant to be informed of the *evidence* against him, the Court's "proof-of-same-conduct" test will be implementable before trial only if the indictment hap-

pens to show that the same evidence is at issue, or only if the jurisdiction's rules of criminal procedure happen to require the prosecution to submit a bill of particulars that cannot be exceeded. More often than not, in other words, the Court's test will not succeed in preventing the defendant from being tried twice.

Relying on text alone, therefore, one would conclude that the Double Jeopardy Clause meant what *Blockburger* said. But there is in addition a wealth of historical evidence to the same effect. The Clause was based on the English common-law pleas of *auterfoits acquit* and *auterfoits convict*, which pleas were valid only "upon a prosecution for the same identical act *and* crime." 4 W. Blackstone, Commentaries 330 (1769) (emphasis added). In that respect they differed from the plea of *auterfoits attaint*, which could be invoked by any person under a sentence of death "whether it be for the same or any other felony." *Ibid.*

The English practice, as understood in 1791, did not recognize *auterfoits acquit* and *auterfoits convict* as good pleas against successive prosecutions for crimes whose elements were distinct, even though based on the same act. An acquittal or conviction for larceny, for example, did not bar a trial for trespass based on "the same taking, because Trespass and Larceny are Offences of a different Nature, and the Judgment for the one entirely differs from that for the other." 2 W. Hawkins, Pleas of the Crown, ch. 36, § 7, p. 376 (4th ed. 1762); see also *id.*, ch. 35, § 5, at 371. Sir Matthew Hale described the rule in similar terms:

> "If *A.* commit a burglary in the county of *B.* and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal.
>
> "And *è converso*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are several offences, tho committed at the same time.

> And burglary may be where there is no larciny, and larciny may be where there is no burglary.
>
> "Thus it hath happened, that a man acquitted for stealing the horse, hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time." 2 M. Hale, Pleas of the Crown, ch. 31, pp. 245–246 (1736 ed.).

Treatises of a slightly later vintage are in accord. Thomas Starkie (frequently cited in early American cases) says:

> "The plea [of *auterfoits acquit*] will be vicious if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.
>
> . . . . .
>
> "So if the defendant be first indicted upon the more general charge, consisting of the circumstances A. and B. only, an acquittal obviously includes an acquittal from a more special charge consisting of the circumstances A. B. and C. for if he be not guilty of the former, he cannot be guilty of those with the addition of a third. But if one charge consist of the circumstances A. B. C. and another of the circumstances A. D. E. then, if the circumstance which belongs to them in common does not of itself constitute a distinct substantive offence, an acquittal from the one charge cannot include an acquittal of the other." 1 T. Starkie, Criminal Pleading, ch. xix, pp. 322–323 (2d ed. 1822).

Likewise:

> "The plea [of *auterfoits acquit*] cannot be sustained if the offences charged in the two indictments are in contemplation of law dissimilar from each other, however nearly analogous in fact and in circumstances . . . . [I]f the former charge were such a one as the defendant could not have been convicted of the latter upon it, the acquittal

> cannot be pleaded." 2 C. Petersdorff, Abridgment 738, n. (1825).

See also 1 J. Chitty, Criminal Law 455–457 (1816).

The cases from this period are few, but they lend support to this view. In *Turner's Case*, Kelyng 30, 84 Eng. Rep. 1068 (K. B. 1708), the defendant was acquitted on an indictment charging burglary by breaking and entering the house of Tryon and taking away great sums of money. Turner was again indicted for burglary by breaking and entering the house of Tryon and removing the money of Tryon's servant. The court held that Turner could not "now be indicted again for the same burglary for breaking the house; but we all agreed, he might be indicted for felony, for stealing the money of [the servant]. For they are several felonies, and he was not indicted of this felony before . . . ." Even the holding of *Turner's Case*—that the second indictment charged the same felony of burglary—was limited in the famous case of *King* v. *Vandercomb*, 2 Leach 708, 168 Eng. Rep. 455 (K. B. 1796). There, the defendants were first charged with burglary by breaking and entering a house and stealing goods. The Crown abandoned the prosecution because it developed at trial that the defendants had not removed any property. In a second prosecution for burglary by breaking and entering with *intent* to steal, the plea of *auterfoits acquit* was held bad:

> "The circumstance of breaking and entering the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary, to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other." *Vandercomb*, *supra*, at 717, 168 Eng. Rep., at 460 (citations omitted).

The court's statement in *Vandercomb* that the "evidence of one of them will not support an indictment for the other," see also *id.*, at 720, 168 Eng. Rep., at 461, is the precise equivalent of our statement in *Blockburger* that "each provision requires proof of a fact which the other does not." 284 U. S., at 304.

The early American cases adhere to the same rule. In *State* v. *Sonnerkalb*, 2 Nott & McCord 280 (S. C. 1820), the defendant was first convicted of retailing liquor without a license. He was then tried a second time for "dealing, trading or trafficking with a negro," *id.*, at 281, based on the same sale, and "the same evidence was given on the part of the state," *id.*, at 280. The court rejected the defendant's claim that he had been convicted twice for the same offense: "[L]et it be admitted, that the defendant committed physically but one act; two offences may be committed by one act . . . ." *Id.*, at 283. Since the first offense required proof of retailing liquor (but it was "immaterial to whom he [did] retail," *id.*, at 282), and the second required proof of sale to a Negro (but it was immaterial what product he sold), the two offenses were different "in legal contemplation." *Ibid.*

Commonwealth v. *Roby*, 12 Pickering 496 (Mass. 1832), after analyzing *King* v. *Vandercomb* and Chitty's treatise, distilled the rule as follows:

> "In considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. . . . [I]t is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and *è converso*, an acquittal on an indictment for manslaughter will be a bar to

> a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder." *Id.*, at 504 (emphasis in original).

Unless one offense is lesser included of the other, the two are not the "same" under this test.

In *State* v. *Standifer*, 5 Porter 523 (Ala. 1837), the defendants were acquitted of murdering Levi Lowry. They were then charged with assault and battery of John Lowry, and pleaded *auterfoits acquit* on the grounds that the charge was based on the same affray as the previous prosecution. The court rejected the plea: "It is not of unfrequent occurrence, that the same individual, at the same time, and in the same transaction, commits two or more distinct crimes, and an acquittal of one, will not be a bar to punishment for the other." *Id.*, at 531. A jury could not lawfully have returned a verdict of guilty of assault on John Lowry at the first trial, and the offenses thus had "no appearance of identity." *Id.*, at 532.

In *State* v. *Sias*, 17 N. H. 558 (1845), the defendant was first acquitted of larceny, and then charged with obtaining property by conspiracy. The State admitted that the "facts alleged and proposed to be proved in this case are precisely the same facts, and same obtaining of the same property as the facts and taking of property which constituted the larceny in the former indictment." *Ibid.* The court held that the second prosecution was not barred:

> "The offence charged in this indictment is not the same as that charged in the former, and of which the defendant has been acquitted; nor is it included in the former. The defendant could not have been convicted of a conspiracy on the former indictment. He cannot be con-

> victed of larceny on this. The proof in the former case may have shown [the codefendant] to be guilty of larceny, and the defendant and others of a conspiracy, but the acquittal was of the larceny charged, and not of the conspiracy, which was not charged; and of which, for that reason, the defendant could neither have been acquitted nor convicted in that case." *Id.*, at 559.

See also *State* v. *Taylor*, 2 Bailey 49, 50 (S. C. 1830) (conviction of "trading with a slave" does not bar prosecution for receiving goods stolen by slave "founded on the same act"; "two distinct offences were committed" because neither offense was necessarily included within the other); *Hite* v. *State*, 17 Tenn. 357, 376 (1836) (following *Vandercomb*); *State* v. *Glasgow*, Dudley 40, 43 (S. C. 1837) (following *Sonnerkalb*); *State* v. *Coombs*, 32 Maine 529, 530 (1851) (conviction for selling liquor does not bar prosecution for being a common seller of such liquors: "In the trial for common selling, the single acts of sale are not prosecuted. They are shown merely as evidence of the larger crime. Such proceedings do not expose to a second punishment for the same offence"); *Wilson* v. *State*, 24 Conn. 57, 63 (1855) (conviction for larceny does not bar prosecution for burglary by breaking and entering with intent to steal because each offense requires proof of facts that other does not: "A uniform doctrine on this point has prevailed, wherever it has been discussed"); *State* v. *Warner*, 14 Ind. 572 (1860) (same rule).

Thus, the *Blockburger* definition of "same offence" was not invented in 1932, but reflected a venerable understanding. *Blockburger* relied on *Gavieres* v. *United States*, 220 U. S. 338, 343 (1911), which relied on *Burton* v. *United States*, 202 U. S. 344, 380–381 (1906), which relied on *Commonwealth* v. *Roby*, *supra*, one of the leading early cases. *Blockburger* and *Gavieres* also cited *Morey* v. *Commonwealth*, 108 Mass. 433, 435 (1871), which also applied *Roby*. We have applied the *Roby-Morey-Gavieres-Blockburger* formulation in virtually every case defining the "same offense" decided since

Blockburger. See, *e. g.*, *Jones* v. *Thomas*, 491 U. S. 376, 384–385, n. 3 (1989); *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)*; *Ohio* v. *Johnson*, 467 U. S. 493, 499, n. 8 (1984); *Albernaz* v. *United States*, 450 U. S. 333, 337 (1981); *Whalen* v. *United States*, 445 U. S. 684, 691 (1980); *Simpson* v. *United States*, 435 U. S. 6, 11 (1978); *Iannelli* v. *United States*, 420 U. S., at 785, n. 17; *Gore* v. *United States*, 357 U. S., at 392.

II

The Court today abandons text and longstanding precedent to adopt the theory that double jeopardy bars "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, *will prove* conduct that constitutes an offense for which the defendant has already been prosecuted." *Ante*, at 521 (emphasis added). The Court purports to derive that standard from our decision in *Illinois* v. *Vitale*, 447 U. S. 410 (1980), in which a motorist who caused a fatal accident was first convicted of unlawful failure to reduce speed, and later charged with involuntary manslaughter. We reversed the lower court's determination that the second prosecution was barred by the *Blockburger* test, because each statute had a statutory element that the other did not: Manslaughter, but not failure to reduce speed, required proof of death; failure to reduce speed, but not manslaughter, required a failure to slow down. In remanding, however, we noted the possibility that the second prosecution might be barred on another ground:

> "[I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, *his claim of double jeopardy*

> *would be substantial* under *Brown* [v. *Ohio*, 432 U. S. 161 (1977),] and our later decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977)." 447 U. S., at 420 (emphasis added).

We did not decide in *Vitale* that the second prosecution would constitute double jeopardy if it required proof of the conduct for which Vitale had already been convicted. We could not possibly have decided that, since the issue was not presented on the facts before us. But beyond that, we did not even *say* in *Vitale*, by way of dictum, that such a prosecution would violate the Double Jeopardy Clause. We said only that a claim to that effect would be "substantial," *ibid.*; see also *id.* at 421, deferring to another day the question whether it would be *successful*. That day is today, and we should answer the question no.

To begin with, the argument that *Vitale* said to be "substantial" finds no support whatever in the two cases that *Vitale* thought gave it substance, *Brown* v. *Ohio*, 432 U. S. 161 (1977), and *Harris* v. *Oklahoma*, 433 U. S. 682 (1977). The first, *Brown*, involved nothing more than a straightforward application of *Blockburger*. There a car thief was first convicted of "joyriding," an offense that consisted of "tak[ing], operat[ing], or keep[ing] any motor vehicle without the consent of its owner." 432 U. S., at 162, n. 1. He was then charged with auto theft, which required all the elements of joyriding plus an intent permanently to deprive the owner of his car. We held that *Blockburger* barred the second prosecution: Because joyriding was simply a lesser included offense of auto theft, proof of the latter would "invariably" require proof of the former. 432 U. S., at 168. We did not even hint that double jeopardy would also have barred the prosecution if the two statutes had *passed* the *Blockburger* test but the second prosecution could not be successful without proving the same facts. The second case, our brief *per curiam* disposition in *Harris*, involved a prosecution for armed robbery that followed a conviction for felony murder

based on the same armed robbery. The felony murder statute by definition incorporated all of the elements of the underlying felony charged; thus the later prosecution (rather than, as in *Brown*, the earlier conviction) involved a lesser included offense. "When," we said, "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U. S., at 682. Again, we gave no indication that the second prosecution would have been barred if—not because of the statutory definition of the crimes but merely because of the circumstances of the particular case—guilt could not be established without proving the same conduct charged in the first prosecution. In short, to call the latter proposition "substantial" in *Vitale* took more than a little stretching of the cited cases.

I would have thought the result the Court reaches today foreclosed by our decision just a few months ago in *Dowling* v. *United States*, 493 U. S. 342 (1990). There the State, in a prosecution for robbery, introduced evidence of the defendant's perpetration of another robbery committed in similar fashion (both involved ski masks), of which he had previously been acquitted. Proof of the prior robbery tended to establish commission of the later one. The State, in other words, "to establish an essential element of an offense charged in [the second] prosecution, [had] prove[d] conduct that constitute[d] an offense for which the defendant ha[d] already been prosecuted." *Ante*, at 521. We held, however, that the Double Jeopardy Clause was not violated. The difference in our holding today cannot rationally be explained by the fact that in *Dowling*, unlike the present case, the two crimes were part of separate transactions; that in no way alters the central vice (according to today's holding) that the defendant was forced a second time to defend against proof that he had committed a robbery for which he had already been prosecuted. In *Dowling*, as here, conduct establishing a previ-

ously prosecuted offense was relied upon, not because that offense was a statutory element of the second offense, but only because the conduct would *prove the existence* of a statutory element. If that did not offend the Double Jeopardy Clause in *Dowling*, it should not do so here.

The principle the Court adopts today is not only radically out of line with our double jeopardy jurisprudence; its practical effect, whenever it applies, will come down to a requirement that where the charges arise from a "'single criminal act, occurrence, episode, or transaction,'" they "must be tried in a single proceeding," *Brown* v. *Ohio*, *supra*, at 170 (BRENNAN, J., concurring)—a requirement we have hitherto "steadfastly refused" to impose, *Garrett* v. *United States*, 471 U. S. 773, 790 (1985). Suppose, for example, that the State prosecutes a group of individuals for a substantive offense, and then prosecutes them for conspiracy. Cf. *Pinkerton* v. *United States*, 328 U. S. 640, 645–646 (1946). In the conspiracy trial it *will prove* (if it can) that the defendants actually committed the substantive offense—even though there is evidence of other overt acts sufficient to sustain the conspiracy charge. For proof of the substantive offense, though not an *element* of the conspiracy charge, will assuredly be *persuasive* in establishing that a conspiracy existed. Or suppose an initial prosecution for burglary and a subsequent prosecution for murder that occurred in the course of the same burglary. In the second trial the State *will prove* (if it can) that the defendant was engaged in a burglary—not because that is itself an element of the murder charge, but because by providing a motive for intentional killing it will be *persuasive* that murder occurred. Under the analysis embraced by the Court today, I take it that the second prosecution in each of these cases would be barred, because the State, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Ante*, at 521. Just as, in today's case, proof of

drunken driving or of crossing the median strip invalidates the second prosecution even though they are not elements of the homicide and assault offenses of which respondent is charged; so also, in the hypotheticals given, proof of the substantive offense will invalidate the conspiracy prosecution and proof of the burglary the murder prosecution.

The Court seeks to shrink the apparent application of its novel principle by saying that repetitive proof violates the Double Jeopardy Clause only if it is introduced "to establish an essential element of an offense charged in [the second] prosecution." That is a meaningless limitation, of course. *All* evidence pertaining to guilt seeks "to establish an essential element of [the] offense," and should be excluded if it does not have that tendency.

The other half of the Court's new test does seem to import some limitation, though I am not sure precisely what it means and cannot imagine what principle justifies it. I refer to the requirement that the evidence introduced in the second prosecution must "prove conduct that constitutes an offense for which the defendant has already been prosecuted." This means, presumably, that prosecutors who wish to use facts sufficient to prove one crime in order to establish guilt of another crime must bring both prosecutions simultaneously; but that those who wish to use only *some of* the facts establishing one crime—not enough facts to "prove conduct that constitutes an offense"—can bring successive prosecutions. But, one may reasonably ask, what justification is there *even in reason alone* (having abandoned text and precedent) for limiting the Court's new rule in this fashion? The Court defends the rule on the ground that a successive prosecution based on the same proof exposes the defendant to the burden and embarrassment of resisting proof of the same facts in multiple proceedings, and enables the State to "rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged." *Ante*, at 518. But that vice does not exist only when the sec-

ond prosecution seeks to prove *all* the facts necessary to support the first prosecution; it exists as well when the second prosecution seeks to prove some, rather than all of them—*i. e.*, whenever two prosecutions each require proof of facts (or even a single fact) common to both. If the Court were correct that the Double Jeopardy Clause protects individuals against the necessity of twice proving (or refuting) the same *evidence*, as opposed to the necessity of twice defending against the same *charge*, then the second prosecution should be equally bad whether it contains all or merely some of the proof necessary for the first.

Apart from the lack of rational basis for this latter limitation, I am greatly perplexed (as will be the unfortunate trial court judges who must apply today's rootless decision) as to what precisely it means. It is not at all apparent how a court is to go about deciding whether the evidence that has been introduced (or that will be introduced) at the second trial "proves conduct" that constitutes an offense for which the defendant has already been prosecuted. Is the judge in the second trial supposed to pretend that he is the judge in the first one, and to let the second trial proceed *only if* the evidence would not be enough to go to the jury on the earlier charge? Or (as the language of the Court's test more readily suggests) is the judge in the second trial supposed to decide on his own whether the evidence before him really "proves" the earlier charge (perhaps beyond a reasonable doubt)? Consider application of the Court's new rule in the unusually simple circumstances of the present case: Suppose that, in the trial upon remand, the prosecution's evidence shows, among other things, that when the vehicles came to rest after the collision they were located on what was, for the defendant's vehicle, the wrong side of the road. The prosecution also produces a witness who testifies that prior to the collision the defendant's vehicle was "weaving back and forth"—*without* saying, however, that it was weaving back and forth over the center line. Is this enough to meet today's require-

ment of "proving" the offense of operating a vehicle on the wrong side of the road? If not, suppose in addition that defense counsel asks the witness on cross-examination, "When you said the defendant's vehicle was 'weaving back and forth,' did you mean weaving back and forth across the center line?"—to which the witness replies "yes." Will this self-inflicted wound count for purposes of determining what the prosecution has "proved"? If so, can the prosecution then seek to impeach its own witness by showing that his recollection of the vehicle's crossing the center line was inaccurate? Or can it at least introduce another witness to establish that fact? There are many questions here, and the answers to all of them are ridiculous. Whatever line is selected as the criterion of "proving" the prior offense—enough evidence to go to the jury, more likely than not, or beyond a reasonable doubt—the prosecutor in the second trial will presumably seek to introduce as much evidence as he can without crossing that line; and the defense attorney will presumably seek to provoke the prosecutor into (or assist him in) proving the defendant guilty of the earlier crime. This delicious role reversal, discovered to have been mandated by the Double Jeopardy Clause lo these 200 years, makes for high comedy but inferior justice. Often, the performance will even have an encore. If the judge initially decides that the previously prosecuted offense "will not be proved" (whatever that means) he will have to decide at the conclusion of the trial whether it "has been proved" (whatever that means). Indeed, he may presumably be asked to make the latter determination periodically during the course of the trial, since the Double Jeopardy Clause assuredly entitles the defendant to have the proceedings terminated as soon as its violation is evident. Even if we had no constitutional text and no prior case law to rely upon, rejection of today's opinion is adequately supported by the modest desire to protect our criminal legal system from ridicule.

A limitation that is so unsupported in reason and so absurd in application is unlikely to survive. Today's decision to extend the Double Jeopardy Clause to prosecutions that *prove* a previously prosecuted offense will lead predictably to extending it to prosecutions that *involve the same facts as* a previously prosecuted offense. We will thus have fully embraced JUSTICE BRENNAN's "same transaction" theory, which has as little support in the text and history of the Double Jeopardy Clause, but at least has the merit of being rational and easy to apply. One can readily imagine the words of our first opinion effecting this extension: "When we said in *Grady* that the second prosecution is impermissible if it 'will prove conduct' that constitutes the prior offense, we did not mean that it will establish commission of that offense with the degree of completeness that would permit a jury to convict. It suffices if the evidence in the second prosecution 'proves' the previously prosecuted offense in the sense of tending to establish one or more of the elements of that offense." The Court that has done what it has today to 200 years of established double jeopardy jurisprudence should find this lesser transmogrification easy. It may, however, prove unnecessary, since prosecutors confronted with the inscrutability of today's opinion will be well advised to proceed on the assumption that the "same transaction" theory has already been adopted. It is hard to tell what else has.

III

Since I do not agree with the Court's new theory of the Double Jeopardy Clause, the question in this case for me is whether the current prosecution will place respondent in jeopardy for the "same offenses" for which he has already been convicted. The elements of the traffic offenses to which he pleaded guilty were, respectively, operating a vehicle on the wrong side of the road, N. Y. Veh. & Traf. Law § 1120(a) (McKinney 1986), and operating a vehicle while in an intoxicated condition, § 1192(3). The elements of the of-

fenses covered by the subsequent charges whose dismissal is challenged here* are, respectively, recklessly causing the death of another person, N. Y. Penal Law § 125.15 (McKinney 1987), negligently causing the death of another person, § 125.10, and recklessly causing physical injury to another person, § 120.00. Because respondent concedes, see *ante*, at 522, that each of these provisions contains an element, in the sense described by *Blockburger*, that the provisions under which he has been convicted do not, they do not constitute the "same offense" within the meaning of the Double Jeopardy Clause. I would therefore reverse the judgment.

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* The court below held two vehicular manslaughter counts barred under the *Blockburger* test, and because the State does not contest that ruling here, see *ante*, at 521, n. 12, I do not reach it.

Syllabus

UNITED STATES *v.* ENERGY RESOURCES CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89–255. Argued March 19, 1990—Decided May 29, 1990

The Internal Revenue Code requires employers to withhold from their employees' paychecks money representing the employees' personal income and Social Security taxes. 26 U. S. C. §§ 3102(a), 3402(a). Because employers must hold these funds in "trust for the United States," § 7501(a), the taxes are commonly called "trust fund" taxes. Should an employer fail to pay such taxes, § 6672 authorizes the Government to collect an equivalent sum directly from the employer's officers or employees who are responsible for collecting the tax and are thus commonly referred to as "responsible" individuals. Newport Offshore, Ltd., and Energy Resources Co., Inc., filed separate petitions for reorganization under Chapter 11 of the Bankruptcy Code. In conjunction with reorganization plans which they had approved, both Bankruptcy Courts authorized payments on the federal tax liabilities of the reorganized corporations to be applied to extinguish their trust fund debts before paying off the nontrust fund portions of the liabilities. The Internal Revenue Service (IRS) appealed both cases to the appropriate Federal District Courts, which, respectively, reversed as to Newport Offshore and affirmed as to Energy Resources. Consolidating the two cases, the Court of Appeals in turn reversed the former but affirmed the latter.

Held: A bankruptcy court has the authority to order the IRS to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the court determines that this designation is necessary for the success of a reorganization plan. Although the Bankruptcy Code does not explicitly authorize such a court to approve reorganization plans designating tax payments as either trust fund or nontrust fund, the orders at issue are wholly consistent with the court's broad authority under the Code to approve plans including "any . . . appropriate provision not inconsistent with . . . this title," 11 U. S. C. § 1123(b)(5), and to "issue any order . . . necessary or appropriate to carry out the [Code's] provisions," § 105. Other Bankruptcy Code provisions protecting the Government's ability to collect delinquent taxes do not preclude the court from issuing such orders, since those restrictions do not address the court's ability to designate whether tax payments are to be applied to trust fund or non-trust-fund liabilities or assure the Government that its

taxes will be paid even if the court is incorrect in its judgment that the reorganization plan will succeed. Nor do the orders at issue contravene § 6672 of the Internal Revenue Code—the "responsible" individuals provision—which remains both during and after the corporate Chapter 11 filing as an alternative source for collecting trust fund taxes. By its terms, that section does not protect against the eventuality that, if the IRS cannot designate a debtor corporation's tax payments as nontrust fund, the debtor might be able to pay only the trust fund debt, leaving the Government at risk for non-trust-fund taxes. Pp. 549–551.

871 F. 2d 223, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., dissented.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Peterson*, *Deputy Solicitor General Wallace*, *Gary D. Gray*, and *Linda E. Mosakowski*.

Guy B. Moss argued the cause for respondents. With him on the brief were *Matthew J. McGowan* and *Martin S. Allen*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we decide that a bankruptcy court has the authority to order the Internal Revenue Service (IRS) to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the bankruptcy court determines that this designation is necessary for the success of a reorganization plan.

I

The Internal Revenue Code requires employers to withhold from their employees' paychecks money representing employees' personal income taxes and Social Security taxes. 26 U. S. C. §§ 3102(a), 3402(a). Because federal law requires employers to hold these funds in "trust for the United

Mark Bernsley filed a brief for GLK, Inc., as *amicus curiae* urging affirmance.

States," 26 U. S. C. § 7501(a), these taxes are commonly referred to as "trust fund" taxes. *Slodov* v. *United States*, 436 U. S. 238, 242–243 (1978). Should employers fail to pay trust fund taxes, the Government may collect an equivalent sum directly from the officers or employees of the employer who are responsible for collecting the tax. 26 U. S. C. § 6672. These individuals are commonly referred to as "responsible" individuals. *Slodov*, *supra*, at 244–245.

This case involves corporations that have filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U. S. C. §§ 1101–1174. Newport Offshore, Ltd., filed a petition for reorganization on November 13, 1985; the Bankruptcy Court approved a reorganization plan in June 1986, creating Newport Oil Offshore, Inc. Over the IRS' objection, that plan included a provision stating that the reorganized Newport Offshore would pay its tax debts (totaling about $300,000) over a period of about six years and that the payments would be applied to extinguish all trust fund tax debts "'prior to the commencement of payment of the non-trust fund portion'" of the tax debts owed. *In re Energy Resources Co.*, 871 F. 2d 223, 226 (CA1 1989). The IRS appealed to the United States District Court for the District of Rhode Island, which reversed in an unpublished opinion. The debtor then sought review in the Court of Appeals for the First Circuit.

Energy Resources Co., Inc., petitioned for reorganization under Chapter 11 in January 1983. In September 1984, the Bankruptcy Court confirmed a reorganization plan that created a special trust which, among other things, was to pay Energy Resources' federal tax debt of approximately $1 million over roughly five years. In November 1985, the trustee of the special trust sent approximately $358,000 in payment to the IRS. The trustee asked the IRS to apply the money to Energy Resources' trust fund tax debt. After the IRS refused to do so, the trustee successfully petitioned the Bankruptcy Court to order the IRS to apply the money to the

trust fund tax liabilities. *Id.*, at 226–227. The IRS appealed this order to the United States District Court for the District of Massachusetts, which affirmed the Bankruptcy Court in an oral opinion. The Government then appealed to the First Circuit.

Consolidating the two cases, the First Circuit reversed in *In re Newport Offshore Ltd.* and affirmed in *In re Energy Resources Co.* *Id.*, at 234. The court first considered whether a tax payment made pursuant to a Chapter 11 reorganization plan is "voluntary" or "involuntary" as those terms are used in the IRS' own rules. IRS policy permits taxpayers who "voluntarily" submit payments to the IRS to designate the tax liability to which the payment will apply. See *id.*, at 227, citing Rev. Rul. 79–284, 1979–2 Cum. Bull. 83, modifying Rev. Rul. 73–305, 1973–2 Cum. Bull. 43, superseding Rev. Rul. 58–239, 1958–1 Cum. Bull. 94. The taxpayer corporations argued that tax payments within a Chapter 11 reorganization are best characterized as "voluntary" and therefore that the IRS' own rules bind the agency to respect the debtors' designation of the tax payments. Granting deference to the agency's interpretation of its own rules, the First Circuit accepted the IRS' view that payments made pursuant to the Chapter 11 plan are involuntary for purposes of the IRS' rules. 871 F. 2d, at 230. The First Circuit concluded, however, that even if the payments were properly characterized as involuntary under the IRS' regulations, the Bankruptcy Courts nevertheless had the authority to order the IRS to apply an "involuntary" payment made by a Chapter 11 debtor to trust fund tax liabilities if the Bankruptcy Court concluded that this designation was necessary to ensure the success of the reorganization. *Id.*, at 230–234.

We granted certiorari because the First Circuit's conclusion on this issue conflicts with decisions in other Circuits. 493 U. S. 963 (1989); see, *e. g.*, *In re Ribs-R-Us, Inc.*, 828 F. 2d 199 (CA3 1987). We affirm the judgment below, for whether or not the payments at issue are rightfully consid-

ered to be involuntary, a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization plan.

II

The Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund. The Code, however, grants the bankruptcy courts residual authority to approve reorganization plans including "any . . . appropriate provision not inconsistent with the applicable provisions of this title." 11 U. S. C. § 1123(b)(5); see also § 1129. The Code also states that bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. § 105 (a). These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships. See *Pepper* v. *Litton*, 308 U. S. 295, 303–304 (1939); *United States National Bank* v. *Chase National Bank*, 331 U. S. 28, 36 (1947); *Katchen* v. *Landy*, 382 U. S. 323, 327 (1966).

The Government suggests that, in this case, the Bankruptcy Courts have transgressed one of the limitations on their equitable power. Specifically, the Government contends that the orders conflict with the Code's provisions protecting the Government's ability to collect delinquent taxes. As the Government points out, the Code provides a priority for specified tax claims, including those at issue in this case, and makes those tax debts nondischargeable. See 11 U. S. C. §§ 507(a)(7), 523(a)(1)(A). The Code, moreover, requires a bankruptcy court to assure itself that reorganization will succeed, § 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax debt owed. The tax debt must be paid off within six years. § 1129(a)(9)(C).

It is evident that these restrictions on a bankruptcy court's authority do not preclude the court from issuing orders of the type at issue here, for those restrictions do not address the bankruptcy court's ability to designate whether tax payments are to be applied to trust fund or non-trust-fund tax liabilities. The Government is correct that, if it can apply a debtor corporation's tax payments to non-trust-fund liability before trust fund liability, it stands a better chance of debt discharge because the debt that is not guaranteed will be paid off before the guaranteed debt. While this result might be desirable from the Government's standpoint, it is an added protection not specified in the Code itself: Whereas the Code gives it the right to be assured that its taxes will be paid in six years, the Government wants an assurance that its taxes will be paid even if the reorganization fails—*i. e.*, even if the bankruptcy court is incorrect in its judgment that the reorganization plan will succeed.

Even if consistent with the Code, however, a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion. The Government maintains that the orders at issue here contravene § 6672 of the Internal Revenue Code, the provision permitting the IRS to collect unpaid trust fund taxes directly from the personal assets of "responsible" individuals. The Government contends that § 6672 reflects a congressional decision to protect the Government's tax revenues by ensuring an additional source from which trust fund taxes might be collected. It is true that § 6672 provides that, if the Government is unable to collect trust fund taxes from a corporate taxpayer, the Government has an alternative source for this revenue. Here, however, the Bankruptcy Courts' orders do not prevent the Government from collecting trust fund revenue; to the contrary, the orders require the Government to collect trust fund payments before collecting non-trust-fund payments. As the Government concedes, § 6672 remains both during and

after the corporate Chapter 11 filing as an alternative collection source for trust fund taxes.

The Government nevertheless contends that the Bankruptcy Courts' orders contravene § 6672 because, if the IRS cannot designate a debtor corporation's tax payments as non-trust-fund, the debtor might be able to pay only the guaranteed debt, leaving the Government at risk for non-trust-fund taxes. This may be the case, but § 6672, by its terms, does not protect against this eventuality. That section plainly does not require us to hold that the orders at issue here, otherwise wholly consistent with a bankruptcy court's authority under the Bankruptcy Code, were nonetheless improvident.

III

In this case, the Bankruptcy Courts have not transgressed any limitation on their broad power. We therefore hold that they may order the IRS to apply tax payments to offset trust fund obligations where it concludes that this action is necessary for a reorganization's success. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BLACKMUN dissents.

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* DAVENPORT ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89–156. Argued February 20, 1990—Decided May 29, 1990

Respondents pleaded guilty to welfare fraud and were ordered by a Pennsylvania court, as a condition of probation, to make monthly restitution payments to petitioner county probation department for petitioner state welfare department. Subsequently, respondents filed a petition under Chapter 13 of the Bankruptcy Code in the Bankruptcy Court, listing the restitution obligation as an unsecured debt. After the probation department commenced a probation violation proceeding in state court, alleging that respondents had failed to comply with the restitution order, respondents filed an adversary action in the Bankruptcy Court seeking both a declaration that the restitution obligation was a dischargeable debt and an injunction preventing the probation department from undertaking any further efforts to collect on the obligation. The Bankruptcy Court held that the obligation was an unsecured debt dischargeable under Chapter 13. The District Court reversed, relying on *Kelly* v. *Robinson*, 479 U. S. 36, which held that restitution obligations are nondischargeable in Chapter 7 proceedings because they fall within Code § 523(a)(7)'s exception to discharge for a debt that is a government "fine, penalty, or forfeiture . . . and is not compensation for actual pecuniary loss." The District Court emphasized the Court's dicta in *Kelly* that Congress did not intend to make criminal penalties "debts" under the Code. The court also emphasized the federalism concerns that are implicated when federal courts intrude on state criminal proceedings. The Court of Appeals reversed.

Held: The Code's language and structure demonstrate that restitution obligations constitute "debts" within the meaning of § 101(11) and are therefore dischargeable under Chapter 13. Pp. 557–564.

(a) Section 101(11)'s definition of "debt" as a "liability on a claim" reveals Congress' intent that the meanings of "debt" and "claim" be coextensive. Furthermore, § 101(4)(a)'s definition of a "claim" as a "right to payment" broadly contemplates any enforceable obligation of the debtor, including a restitution order. Petitioners' reliance on *Kelly*'s discussion emphasizing the special purposes of punishment and rehabilitation that underlie the imposition of restitution obligations is misplaced. Unlike § 523(a)(7), which explicitly ties its application to the purpose of the

compensation, § 104(4)(A) makes no reference to the objectives the State seeks to serve in imposing an obligation. That the probation department's enforcement mechanism is criminal rather than civil also does not alter the restitution order's character as a "right to payment" and, indeed, may make the right greater than that conferred by an ordinary civil obligation, since it is secured by the debtor's freedom rather than his property. Pp. 557–560.

(b) Other Code provisions do not reflect a congressional intent to exempt restitution orders from Chapter 13 discharge. Section 362(b)(1), which removes criminal prosecutions of the debtor from the operation of the Code's automatic stay provision, is not inconsistent with granting him sanctuary from restitution orders under Chapter 13. Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government, but that a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in a Chapter 13 plan. Nor must § 726(a)(4)—which in effect establishes the order for settlement of claims under such plans, assigning a low priority to a claim "for any fine, penalty, or forfeiture"—be construed to apply only to *civil* fines and not to *criminal* restitution orders in order to assure that governments do not receive disfavored treatment relative to other creditors. That construction conflicts with *Kelly*'s holding that the quoted phrase, when used in § 523(a)(7), applies to criminal restitution obligations. It also highlights the tension between *Kelly*'s interpretation of § 523(a)(7) and its dictum suggesting that restitution obligations are not "debts." If Congress believed that such obligations were not "debts" giving rise to "claims," it would have had no reason to except the obligations from discharge, and § 523(a)(7) would be mere surplusage. Moreover, *Kelly* is faithful to the language and structure of the Code: Congress defined "debt" broadly and carefully excepted particular debts from discharge where policy considerations so warranted. In thus securing a broader discharge of debtors under Chapter 13 than Chapter 7, Congress chose not to extend § 523(a)(7)'s exception to Chapter 13. Thus, it would override the balance Congress struck in crafting the appropriate discharge exceptions to construe "debt" narrowly in this context. Pp. 560–563.

(c) This holding does not signal a retreat from the principles applied in *Kelly*. The Code will not be read to erode past bankruptcy practice absent a clear indication that Congress intended such a departure. However, where, as here, congressional intent is clear, the Court's function is to enforce the statute according to its terms, even where this means

concluding that Congress intended to interfere with States' administration of their criminal justice systems. Pp. 563–564.

871 F. 2d 421, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 564.

Walter W. Cohen, First Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With him on the briefs were *Ernest D. Preate, Jr.*, Attorney General, *John G. Knorr III*, Chief Deputy Attorney General, *Calvin R. Koons*, Senior Deputy Attorney General, and *Mary Benefield Seiverling*, Deputy Attorney General.

David A. Searles argued the cause for respondents. With him on the briefs were *Eric L. Frank* and *Henry J. Sommer.**

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorneys General Dennis* and *Gerson*, *Deputy Solicitor General Roberts*, and *Stephen L. Nightingale*; for the State of Alabama et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, *Walter A. McFarlane*, Deputy Attorney General, and *Jeffrey A. Spencer*, Assistant Attorney General, *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John K. Van de Kamp*, Attorney General of California, *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, and *John J. Kelly*, Chief States Attorney, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *James M. Shannon*, Attorney General of Massachusetts, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *John P. Arnold*, Attorney General of New Hampshire, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North

JUSTICE MARSHALL delivered the opinion of the Court.

In *Kelly* v. *Robinson*, 479 U. S. 36, 50 (1986), this Court held that restitution obligations imposed as conditions of probation in state criminal actions are nondischargeable in proceedings under Chapter 7 of the Bankruptcy Code, 11 U. S. C. § 701 *et seq.* The Court rested its holding on its interpretation of the Code provision that protects from discharge any debt that is "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." § 523(a)(7). Because the Court determined that restitution orders fall within § 523(a)(7)'s exception to discharge, it declined to reach the question whether restitution orders are "debt[s]" as defined by § 101(11) of the Code. In this case, we must decide whether restitution obligations are dischargeable debts in proceedings under Chapter 13, § 1301 *et seq.* The exception to discharge relied on in *Kelly* does not extend to Chapter 13. We conclude, based on the language and structure of the Code, that restitution obligations are "debt[s]" as defined by § 101(11). We therefore hold that such payments are dischargeable under Chapter 13.

I

In September 1986, respondents Edward and Debora Davenport pleaded guilty in a Pennsylvania court to welfare

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Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Anthony Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Jorge E. Perez-Diaz*, Solicitor General of Puerto Rico, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Godfrey R. de Castro*, Attorney General of the Virgin Islands, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Council of State Governments et al. by *Benna Ruth Solomon* and *Thomas D. Goldberg;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Richard A. Samp.*

fraud and were sentenced to one year's probation. As a condition of probation, the state court ordered the Davenports to make monthly restitution payments to the county probation department, which in turn would forward the payments to the Pennsylvania Department of Public Welfare, the victim of the Davenports' fraud. Pennsylvania law mandates restitution of welfare payments obtained through fraud, Pa. Stat. Ann., Tit. 62, § 481(c) (Purdon Supp. 1989), and directs the probation section to "forward to the victim the property or payments made pursuant to the restitution order," 18 Pa. Cons. Stat. § 1106(e) (1988).

In May 1987, the Davenports filed a petition under Chapter 13 in the United States Bankruptcy Court for the Eastern District of Pennsylvania. In their Chapter 13 statement, they listed their restitution obligation as an unsecured debt payable to the Department of Public Welfare. Soon thereafter, the Adult Probation and Parole Department of Bucks County (Probation Department) commenced a probation violation proceeding, alleging that the Davenports had failed to comply with the restitution order. The Davenports informed the Probation Department of the pending bankruptcy proceedings and requested that the Department withdraw the probation violation charges until the bankruptcy issues were settled. The Probation Department refused, and the Davenports filed an adversary action in Bankruptcy Court seeking both a declaration that the restitution obligation was a dischargeable debt and an injunction preventing the Probation Department from undertaking any further efforts to collect on the obligation.

While the adversary action was pending, the Bankruptcy Court confirmed the Davenports' Chapter 13 plan without objection from any creditor.[1] Although notified of the

[1] The Davenports subsequently fulfilled their obligations under the plan and received a discharge pursuant to 11 U. S. C. § 1328(a), which provides: "As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge

proceedings, neither the Probation Department nor the Department of Public Welfare filed a proof of claim in the bankruptcy action. Meanwhile, the Probation Department proceeded in state court on its motion to revoke probation. Although the court declined to revoke the Davenports' probation and extended their payment period, it nonetheless ruled that its restitution order remained in effect.

The Bankruptcy Court subsequently held that the Davenports' restitution obligation was an unsecured debt dischargeable under 11 U. S. C. § 1328(a). 83 B. R. 309 (ED Pa. 1988). On appeal, the District Court reversed, holding that state-imposed criminal restitution obligations cannot be discharged in a Chapter 13 bankruptcy. 89 B. R. 428 (ED Pa. 1988). The District Court emphasized the federalism concerns that are implicated when federal courts intrude on state criminal processes, *id.*, at 430, and relied substantially on dicta in *Kelly*, *supra*, at 50, where the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts'" under the Code. The Court of Appeals for the Third Circuit reversed, concluding that "the plain language of the chapter" demonstrated that restitution orders are debts within the meaning of the Code and hence dischargeable in proceedings under Chapter 13. *In re Johnson-Allen*, 871 F. 2d 421, 428 (1989).

To address a conflict among Bankruptcy Courts on this issue,[2] we granted certiorari, 493 U. S. 808 (1989).

II

Our construction of the term "debt" is guided by the fundamental canon that statutory interpretation begins with the

executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title." The section contains two exceptions that the parties agree are not applicable to this case.

[2] Compare, *e. g.*, *In re Kohr*, 82 B. R. 706, 712 (MD Pa. 1988) (restitution obligations are not "debts" within the meaning of the Code), with *In re Cullens*, 77 B. R. 825, 828 (Colo. 1987) (restitution orders are "debts").

language of the statute itself. *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 685 (1985). Section 101(11) of the Bankruptcy Code defines "debt" as a "liability on a claim." This definition reveals Congress' intent that the meanings of "debt" and "claim" be coextensive. See also H. R. Rep. No. 95–595, p. 310 (1977); S. Rep. No. 95–989, p. 23 (1978). Thus, the meaning of "claim" is crucial to our analysis. A "claim" is a "*right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U. S. C. § 101(4)(A) (emphasis added). As is apparent, Congress chose expansive language in both definitions relevant to this case. For example, to the extent the phrase "right to payment" is modified in the statute, the modifying language ("whether or not such right is . . .") reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a "claim" giving rise to a "debt." See also H. R. Rep. No. 95–595, *supra*, at 309 (describing definition of "claim" as "broadest possible" and noting that Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case"); accord, S. Rep. No. 95–989, *supra*, at 22.

Petitioners maintain that a restitution order is not a "right to payment" because neither the Probation Department nor the victim stands in a traditional creditor-debtor relationship with the criminal offender. In support of this position, petitioners refer to *Kelly*'s discussion of the special purposes of punishment and rehabilitation underlying the imposition of restitution obligations. 479 U. S., at 52. Petitioners also emphasize that restitution orders are enforced differently from other obligations that are considered "rights to payment."

In *Kelly*, the Court decided that restitution orders fall within 11 U. S. C. § 523(a)(7)'s exception to discharge provision, which protects from discharge any debt "to the extent

such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." In reaching that conclusion, the Court necessarily found that such orders are "not compensation for actual pecuniary loss." Rather, "[b]ecause criminal proceedings focus on the State's interests in rehabilitation and punishment," the Court held that "restitution orders imposed in such proceedings operate 'for the benefit of' the State" and not "'for . . . compensation' of the victim." 479 U. S., at 53.

Contrary to petitioners' argument, however, the Court's prior characterization of the purposes underlying restitution orders does not bear on our construction of the phrase "right to payment" in § 101(4)(A). The Court in *Kelly* analyzed the purposes of restitution in construing the qualifying clauses of § 523(a)(7), which explicitly tie the application of that provision to the purpose of the compensation required. But the language employed to define "claim" in § 101(4)(A) makes no reference to purpose. The plain meaning of a "right to payment" is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation.

Nor does the State's method of enforcing restitution obligations suggest that such obligations are not "claims." Although neither the Probation Department nor the victim can enforce restitution obligations in civil proceedings, *Commonwealth* v. *Mourar*, 349 Pa. Super. 583, 603, 504 A. 2d 197, 208 (1986), vacated and remanded on other grounds, 517 Pa. 83, 534 A. 2d 1050 (1987), the obligation is enforceable by the substantial threat of revocation of probation and incarceration. That the Probation Department's enforcement mechanism is criminal rather than civil does not alter the restitution order's character as a "right to payment." Indeed, the right created by such an order made as a condition of probation is in some sense greater than the right conferred by an ordinary civil obligation, because it is secured by the debtor's freedom

rather than his property. Accordingly, we do not regard the purpose or enforcement mechanism of restitution orders as placing such orders outside the scope of § 101(4)(A).

III

Moving beyond the language of § 101, the United States, appearing as *amicus* in support of petitioners, contends that other provisions in the Code, particularly the exemption to the automatic stay provision, § 362(b)(1), and Chapter 7's distribution of claims provision, § 726, reflect Congress' intent to exempt restitution orders from discharge under Chapter 13. We are not persuaded, however, that the language or the structure of the Code as a whole supports that conclusion.

Section 362(a) automatically stays a wide array of collection and enforcement proceedings against the debtor and his property.[3] Section 362(b)(1) exempts from the stay "the commencement or continuation of a criminal action or proceeding against the debtor." According to the Senate Report, the exception from the automatic stay ensures that "[t]he bankruptcy laws are not a haven for criminal offenders." S. Rep. No. 95–989, *supra*, at 51. Section 362(b)(1) does not, however, explicitly exempt governmental efforts to collect restitution obligations from a debtor. Cf. 11 U. S. C. § 362(b)(2) ("collection of alimony, maintenance, or support" is not barred by the stay). Nonetheless, the United States argues that it would be anomalous to construe the Code as eliminating a haven for criminal offenders under the automatic stay provision while granting them sanctuary from restitution obligations under Chapter 13.

We find no inconsistency in these provisions. Section 362(b)(1) ensures that the automatic stay provision is not construed to bar federal or state prosecution of alleged criminal

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[3] Although the automatic stay protects a debtor from various collection efforts over a specified period, it does not extinguish or discharge any debt. See generally 1 W. Norton, Bankruptcy Law and Practice §§ 20.04–20.36 (1986 and Supp. 1989).

offenses. It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13. Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in the Chapter 13 plan.

The United States' reliance on § 726 is likewise unavailing. That section establishes the order in which claims are settled under Chapter 7. Section 726(a)(4) assigns a low priority to "any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim." The United States argues that the phrase "fine, penalty, or forfeiture" should be construed to apply only to *civil* fines, penalties, and forfeitures, and not to *criminal* restitution obligations. Otherwise, State and Federal Governments will receive disfavored treatment relative to other creditors both in Chapter 7 and Chapter 13 proceedings, see § 1325(a)(4) (a Chapter 13 plan must ensure that unsecured creditors receive no worse treatment than they would under Chapter 7), a result the United States regards as anomalous given the strength of the governmental interest in collecting restitution payments.

The central difficulty with the United States' construction of § 726(a)(4) is that it conflicts with *Kelly*'s holding that § 523(a)(7), the exception to discharge provision, applies to *criminal* restitution obligations. 479 U. S., at 51 (§ 523(a)(7) "creates a broad exception for all penal sanctions"). The United States acknowledges that the phrase "fine, penalty,

or forfeiture" as it appears in § 726(a)(4) must have the same meaning as in § 523(a)(7). We are unwilling to revisit *Kelly*'s determination that § 523(a)(7) "protects traditional *criminal* fines [by] codif[ying] the judicially created exception to discharge for fines." *Ibid.* (emphasis added). Thus, we reject the view that §§ 523(a)(7) and 726(a)(4) implicitly refer only to *civil* fines and penalties.[4]

The United States' position here highlights the tension between *Kelly*'s interpretation of § 523(a)(7) and its dictum suggesting that restitution obligations are not "debts." See *supra*, at 557. As stated above, *Kelly* found explicitly that § 523(a)(7) "codifies the judicially created exception to discharge" for both civil and criminal fines. 479 U. S., at 51. Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in § 523(a)(7). Given *Kelly*'s interpretation of § 523(a)(7), then, it would be anomalous to construe "debt" narrowly so as to exclude criminal restitution orders. Such a narrow construction of "debt" necessarily renders § 523(a)(7)'s codification of the judicial exception for criminal restitution orders mere surplusage. Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. See, *e. g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988).

Moreover, in locating Congress' policy choice regarding the dischargeability of restitution orders in § 523(a)(7), *Kelly* is faithful to the language and structure of the Code: Congress defined "debt" broadly and took care to except particular debts from discharge where policy considerations so war-

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[4] In any event, the Government's contention that Congress must have intended to favor criminal, as opposed to civil, claims held by the government is unsubstantiated. The United States' view about the wisdom of this policy choice, unsupported by any textual authority that Congress in fact adopted such a policy, is an inadequate basis for rejecting the statute's broad definition of "debt." See *supra*, at 557–558.

ranted. Accordingly, Congress secured a broader discharge for debtors under Chapter 13 than Chapter 7 by extending to Chapter 13 proceedings some, but not all, of § 523(a)'s exceptions to discharge. See 5 Collier on Bankruptcy ¶ 1328.01 [1][c] (15th ed. 1986) ("[T]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives") (footnote omitted). Among those exceptions that Congress chose *not* to extend to Chapter 13 proceedings is § 523(a)(7)'s exception for debts arising from a "fine, penalty, or forfeiture." Thus, to construe "debt" narrowly in this context would be to override the balance Congress struck in crafting the appropriate discharge exceptions for Chapter 7 and Chapter 13 debtors.

IV

Our refusal to carve out a broad judicial exception to discharge for restitution orders does not signal a retreat from the principles applied in *Kelly*. We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure. *Kelly*, *supra*, at 47 (citing *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494 (1986)). In *Kelly*, the Court examined pre-Code practice and identified a general reluctance "to interpret federal bankruptcy statutes to remit state criminal judgments." 479 U. S., at 44. This pre-Code practice informed the Court's conclusion that § 523(a)(7) broadly applies to all penal sanctions, including criminal fines. Here, on the other hand, the statutory language plainly reveals Congress' intent not to except restitution orders from discharge in certain Chapter 13 proceedings. This intent is clear from Congress' decision to limit the exceptions to discharge applicable to Chapter 13, § 1328(a), as

well as its adoption of the "broadest possible" definition of "debt" in § 101(11). See *supra*, at 558.

Nor do we conclude lightly that Congress intended to interfere with States' administration of their criminal justice systems. *Younger* v. *Harris*, 401 U. S. 37, 46 (1971). As the Court stated in *Kelly*, permitting discharge of criminal restitution obligations may hamper the flexibility of state criminal judges in fashioning appropriate sentences and require state prosecutors to participate in federal bankruptcy proceedings to safeguard state interests. 479 U. S., at 49. Certainly the legitimate state interest in avoiding such intrusions is not lessened simply because the offender files under Chapter 13 rather than Chapter 7. Nonetheless, the concerns animating *Younger* cannot justify rewriting the Code to avoid federal intrusion. Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its terms.

V

Restitution obligations constitute debts within the meaning of § 101(11) of the Bankruptcy Code and are therefore dischargeable under Chapter 13. The decision of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

The Court today concludes that Congress intended an obligation to pay restitution imposed as part of a state criminal sentence to be a "debt" within the meaning of the United States Bankruptcy Code. Because Congress has given no clear indication that it intended to abrogate the long "history of bankruptcy court deference to criminal judgments," *Kelly* v. *Robinson*, 479 U. S. 36, 44 (1986), and because there is no suggestion in the Bankruptcy Code that it may be used as a shield to protect a criminal from punishment for his crime, I must disagree.

This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. See *Kelly*, *supra;* see also *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494 (1986). When analyzing a bankruptcy statute, the Court, of course, looks to its plain language. But the Court has warned against an overly literal interpretation of the Bankruptcy Code. "'[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Kelly*, 479 U. S., at 43, quoting, as have other opinions of this Court, *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849). The strict language of the Bankruptcy Code does not control, even if the statutory language has a "plain" meaning, if the application of that language "will produce a result demonstrably at odds with the intention of its drafters." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 242 (1989). To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978. *Midlantic*, 474 U. S., at 501. For me, the statutory language, the consistent authority treating criminal sanctions as nondischargeable under the Bankruptcy Act of 1898, the absence of any legislative history suggesting that the Code was intended to change that established principle, and the strong policy of deference to state criminal judgments all compel the conclusion that a restitution order is not a dischargeable debt.

The majority appropriately begins its analysis with the language of the statute. As the majority points out, the Bankruptcy Code defines "debt" as a "liability on a claim." 11 U. S. C. § 101 (11). The term "claim," in turn, is defined as a "right to payment." § 101(4)(A). The question then becomes whether it is clear from the statutory language alone that a restitution order is a "right to payment," or whether the statutory language, "at least to *some degree*, [is] open to interpretation." *Ron Pair*, 489 U. S., at 245–246 (emphasis

added). The majority simply asserts that the plain meaning of "right to payment" is an "enforceable obligation," which gives a restitution order the "character" of a "right to payment." *Ante*, at 559. I cannot accept this easy conclusion.

Some time ago, Justice Frankfurter pointed out: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States* v. *Monia*, 317 U. S. 424, 431 (1943) (dissenting opinion). This observation rings especially true in this case. It is not at all clear to me that the words "right to payment" plainly include an obligation resulting from a criminal restitution order. While the words may be of common usage, their meaning is not at all plain in this context. Notably absent from the Code's definition (and from the legislative history) of both "debt" and "claim" is any indication that Congress intended the discharge provisions to extend into the criminal sphere. Indeed, there are persuasive reasons for excluding criminal restitution from the category of "debts." Petitioners argue—not without force—that a criminal restitution order is not a "right to payment" because neither the victim of the crime nor the Probation Department possesses a right to payment of a restitution order. Brief for Petitioners 22. Petitioners also argue that because the victim has no right of enforcement, the victim has no right to payment. *Id.*, at 27; see also *Commonwealth* v. *Mourar*, 349 Pa. Super. 583, 603, 504 A. 2d 197, 208 (1986) (if criminal defendant fails to make restitution as ordered, victim has no right of enforcement), vacated and remanded on other grounds, 517 Pa. 83, 534 A. 2d 1050 (1987); cf. *Bearden* v. *Georgia*, 461 U. S. 660 (1983) (state court cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay). Several Bankruptcy Courts have agreed with petitioners and have decided that the definition of "debt" in the Bankruptcy Code does *not* include a criminal restitution order. See, *e. g.*, *In re Norman*, 95 B. R. 771, 773, and n. 3 (Colo. 1989) (criminal penalties

and fines are not "debt[s]" as defined under § 101(11) of the Code; because crime victim has no "right to payment," restitution is not a "debt"); *In re Pellegrino*, 42 B. R. 129, 132 (Conn. 1984) (since "crime victim has no 'right to payment,' restitution is not a 'debt' under Bankruptcy Code § 101(11)"; *In re Magnifico*, 21 B. R. 800 (Ariz. 1982) (criminal restitution not a "debt" contemplated by Bankruptcy Code); *In re Button*, 8 B. R. 692, 694 (WDNY 1981) ("From these definitions [of 'debt,' '[c]laim,' and '[c]reditor'], it does not appear that restitution could be considered a debt"); accord, *In re Kohr*, 82 B. R. 706, 712 (MD Pa. 1988); *In re Oslager*, 46 B. R. 58 (MD Pa. 1985); *In re Mead*, 41 B. R. 838 (Conn. 1984). Other Bankruptcy Courts, to be sure, have determined that the definition of "debt" does include restitution obligations. See, *e. g.*, *In re Vandrovec*, 61 B. R. 191 (N. D. 1986). At the least, these varied interpretations of the Code by bankruptcy judges are evidence that the phrase "right to payment," when applied to restitution orders, is "subject to interpretation." *Kelly*, 479 U. S., at 50. The statute, on its face, is not self-defining and surely does not compel the result that criminal restitution orders constitute "debts."

My conclusion that the majority errs in concluding that the words "right to payment" include restitution orders is supported by the fact that such an interpretation would produce a result "'demonstrably at odds with the intention of its drafters.'" *Ron Pair*, 489 U. S., at 244, quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982). This Court has declared that, to effectuate Congress' intent in enacting the Code, we must consider the language of § 101 "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Kelly*, 479 U. S., at 44. That deference was reflected in the judicial interpretation of the discharge provisions of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. In *Kelly*, the Court discussed at length the customary pre-Code practice of

holding that criminal monetary sanctions were not dischargeable in bankruptcy. See 479 U. S., at 44–45. The Court explained that the new Code was enacted in 1978 to replace the 1898 Act and noted: "The treatment of criminal judgments under the Act of 1898 informs our understanding of the language of the Code." *Id.*, at 44.

Because Congress' presumed intent is to preserve pre-Code practice unless it specifically indicates otherwise, we must first consider the treatment of criminal restitution orders under the 1898 Act. That Act established two categories of debts, those that were "allowable" and those that were "provable." "Only if a debt was allowable could the creditor receive a share of the bankrupt's assets." *Ibid.*, citing § 65a. Only provable debts were dischargeable. See § 17. The Court in *Kelly* explained that penalties or forfeitures owed to governmental entities generally were not allowable, § 57j; but the Act failed to state that such debts were not provable. See § 63. Given this statutory scheme, "[t]he most natural construction of the Act, therefore, would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate." 479 U. S., at 44–45. Nonetheless, courts consistently "refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." *Id.*, at 45. See, *e. g.*, *In re Abramson*, 210 F. 878, 880 (CA2 1914) ("[J]udgments for penalties are not debts which can be proved or allowed as such because they are not for a fixed liability"); cf. *In re Alderson*, 98 F. 588 (W. Va. 1899) (the only federal-court decision found by the *Kelly* Court that allowed a discharge to affect a sentence imposed by a state criminal court). In fact, the judicially created exception to discharge was "so widely accepted by the time Congress enacted the new Code that a leading commentator could state flatly that 'fines and penalties are not affected by a discharge.'" *Kelly*, 479 U. S., at 46, quoting 1A Collier on Bankruptcy ¶ 17.13, pp. 1609–1610, and n. 10 (14th ed. 1978).

Those courts addressing criminal restitution orders "applied the same reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence." 479 U. S., at 46. As a result, when Congress enacted the Bankruptcy Code in 1978, there existed an "established judicial exception to discharge for criminal sentences, including restitution orders." *Ibid.* See also *Zwick* v. *Freeman*, 373 F. 2d 110, 116 (CA2 1967) ("[G]overnmental sanctions are not regarded as debts even when they require monetary payments"). Because criminal sanctions were not dischargeable, they were also not "provable," as the two terms tended to merge in pre-Code practice. See Collier, *supra*, at ¶ 17.05, p. 1587 (pre-Code practice held that "[f]ines for violation of law, and forfeitures, are not provable [for purposes of § 63], and, therefore, not dischargeable" (footnotes omitted)).

Thus, under the 1898 Act, criminal monetary sanctions were not allowable, provable, or dischargeable in bankruptcy. In functional terms, criminal monetary sanctions were not "debts" for the purpose of pre-Code bankruptcy proceedings. This judicially created pre-Code practice "reflected policy considerations of great longevity and importance," that is, "'a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings.'" *Ron Pair*, 489 U. S., at 245, quoting *Kelly*, 479 U. S., at 47.

In the face of such a longstanding principle, "a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code." *Ibid.* The Court stated in *Midlantic:* "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." 474 U. S., at 501. There is no indication that Congress had any intent so drastically to change the established pre-Code practice regarding criminal sanctions. Although the Bankruptcy

Code definition of "debt" is a broad one, "nothing in the legislative history [of the Bankruptcy Code provisions] compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." *Kelly*, 479 U. S., at 50, n. 12; see also *Midlantic* (despite Code language that the dissent labeled "absolute in its terms," 474 U. S., at 509, the Court refused to find that Congress had implicitly abrogated a judicially created pre-Code limitation on abandonment powers). Indeed, "[i]n light of the established state of the law—that bankruptcy courts could not discharge criminal judgments," the *Kelly* Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." 479 U. S., at 50. If Congress had intended such a radical change, surely it would have spoken more clearly. In my view, Congress' attitude towards criminal sanctions is most clearly indicated in the statement that "[t]he bankruptcy laws are not a haven for criminal offenders." H. R. Rep. No. 95–595, p. 342 (1977) (discussing automatic stay provisions).

The majority today brushes aside the rule of statutory construction outlined by this Court—a rule the Court has stressed must be used with "*particular care* in construing the scope of bankruptcy codifications." *Midlantic*, 474 U. S., at 501 (emphasis added). The majority insists that its holding does not signal a retreat from the principles applied in *Kelly* because there is a "*clear indication*" that Congress intended to depart from past bankruptcy practice. *Ante*, at 563 (emphasis added). The majority contends that Congress made that intent "clear" by its "adoption of the 'broadest possible' definition of 'debt.'" *Ante*, at 564. I disagree. And I am puzzled by the majority's position because the Court previously has rejected it expressly. See *Kelly*, 479 U. S., at 50, n. 12 (although the definition of "debt" was broadened, "nothing in the legislative history of these sections compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments"). Moreover, it seems

more likely that the broader definition was enacted simply to redress the problems created by the restrictive definitions of "allowable" and "provable" claims under the Act that made it impossible for some debtors to resolve all their civil liabilities in bankruptcy. Of particular concern were contingent and unliquidated claims that were "nonprovable" under the Act:

> "[U]nder the liquidation chapters of the Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims, and the debtor is not discharged from those claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start." H. R. Rep. No. 95–595, *supra*, at 180 (footnote omitted).

The statutory language itself highlights this approach. The Code's definition of "claim" includes any right to payment that is "unliquidated," "contingent," "unmatured," or "disputed," 11 U. S. C. § 101(4)(A), but does not include any modifier that in any way suggests the incorporation of criminal sanctions.

The majority's assertion that Congress' enactment of § 523 (a)(7) evidences a "clear indication" to abrogate pre-Code rulings that criminal sanctions were neither provable nor dischargeable in bankruptcy is similarly unconvincing. Under § 523(a)(7), a debt is not dischargeable "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty." § 523(a)(7). The majority reasons that if restitution obligations were not debts, there would be no need to except them from discharge; therefore, it says, Congress clearly intended that criminal restitution orders be considered debts. Because § 523(a)(7) does not apply to all Chapter 13 proceedings, the majority contends that criminal restitution obligations should be con-

sidered dischargeable debts under Chapter 13. *Ante*, at 562–563. Again, I disagree. The enactment of this single provision of the Bankruptcy Code does little to demonstrate clear congressional intent to change traditional pre-Code practice. Even if § 523(a)(7) can be interpreted as making criminal restitution orders not dischargeable, this does not mean that Congress intended to make criminal restitution orders debts. Under pre-Code practice, nondischargeability of a criminal restitution order would be evidence that it was not a debt at all. Congress gave no indication that it intended to break with this pre-Code conception of dischargeability when it enacted § 523(a)(7).

In addition, pre-Code Chapter XIII essentially adopted Chapter VII discharge policy, excepting from discharge all debts that were not dischargeable under Chapter VII when those debts were held by creditors who had not accepted the bankruptcy plan. See § 60 of the Act. Congress' failure to include a parallel provision to § 523(a)(7) in Chapter 13, far from demonstrating a clear intent to make fines dischargeable in Chapter 13, is more likely a carryover from pre-Code practice, where Chapter XIII relied on Chapter VII's discharge provisions. "If Congress had intended, by § 523(a)(7) or by any other provision," to change the pre-Code practice of holding monetary sanctions not allowable, provable, or dischargeable in bankruptcy, "'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" *Kelly*, 479 U. S., at 51, quoting Powell, J., dissenting, in *TVA* v. *Hill*, 437 U. S. 153, 209 (1978).

I do not believe that Congress so cavalierly would have disregarded the States' overwhelmingly important interest in administering their criminal justice systems free from the interference of a federal bankruptcy judge. Every State and the District of Columbia presently authorize the use of restitution orders. See Note, Criminal Restitution as a Limited

Opportunity, 13 New Eng. J. on Crim. & Civ. Confinement 243–244, n. 9 (1987). A bankruptcy court discharge of a criminal restitution order is a deep intrusion by the federal courts into the State's sovereign power. It vacates a criminal sentence that has presumably been entered in full accord with all substantive and procedural mandates of the Constitution. I seriously doubt that "Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges." *Kelly*, 479 U. S., at 49.

The majority's decision today will have an adverse effect on the sentencing process. The judgment of sentencing courts and legislators that rehabilitation is the most effective form of punishment will be tempered by the knowledge that convicted criminals easily may avoid a sentence requiring restitution merely by obtaining a Chapter 13 discharge. Sentencing courts will be faced with a dilemma. The sentencing judge must either risk that a federal bankruptcy judge will undermine a restitution order, thus absolving the convicted criminal from punishment, or impose a harsher and less appropriate term of imprisonment, a sentence that the federal bankruptcy court will be unable to undermine. Congress surely would not have enacted legislation with such an extraordinary result without at least some discussion of its consequences.

The majority's holding turns *Kelly* around. The *Kelly* Court stressed this compelling federalism concern, terming it "one of the most powerful of the considerations that should influence a court considering equitable types of relief," and recognized that it "must influence our interpretation of the Bankruptcy Code." 479 U. S., at 49. The Court was concerned that "federal remission of judgments imposed by state criminal judges . . . would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Ibid.* The concerns of the *Kelly* Court are no less applicable in this

case. Congress' intent to invalidate the results of state criminal proceedings is far from clear. There is simply no suggestion that Congress intended to depart from pre-Code practice and encroach so deeply upon the States' administration of their criminal justice systems. In the absence of evidence of congressional intent to the contrary, the statutory construction rule set forth in *Kelly* and *Midlantic* requires a determination that the Bankruptcy Code does not permit convicted criminals to discharge their restitution obligations in Chapter 13 proceedings. I would therefore refuse to allow the Bankruptcy Code to become a sanctuary for a criminal trying to avoid the punishment meted out by a state-court judge.

I dissent.

Syllabus

TAYLOR *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–7194. Argued February 28, 1990—Decided May 29, 1990

When petitioner Taylor pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U. S. C. § 922(g)(1), he had four prior convictions, including two for second-degree burglary under Missouri law. The Government sought to apply § 924(e), which, *inter alia*, (1) provides a sentence enhancement for a "person" convicted under § 922(g) who "has three previous convictions . . . for a violent felony," and (2) defines "violent felony" as "(B) . . . any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against [another's] person," or "(ii) is burglary [or other specified offenses] or otherwise involves conduct that presents a serious potential risk of physical injury to another." In imposing an enhanced sentence upon Taylor, the District Court rejected his contention that, because his burglary convictions did not present a risk of physical injury under § 924(e)(2)(B)(ii), they should not count. The Court of Appeals affirmed, ruling that the word "burglary" in § 924(e)(2)(B)(ii) "means 'burglary' however a state chooses to define it."

Held: An offense constitutes "burglary" under § 924(e) if, regardless of its exact definition or label, it has the basic elements of a "generic" burglary—*i. e.*, an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime—or if the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant. Pp. 581–602.

(a) The convicting State's definition of "burglary" cannot control the word's meaning under § 924(e), since that would allow sentence enhancement for identical conduct in different States to turn upon whether the particular States happened to call the conduct "burglary." That result is not required by § 924(e)'s omission of a "burglary" definition contained in a prior version of the statute absent a clear indication that Congress intended by the deletion to abandon its general approach of using uniform categorical definitions for predicate offenses. "Burglary" in § 924(e) must have some uniform definition independent of the labels used by the various States' criminal codes. Cf. *United States* v. *Nardello*, 393 U. S. 286, 293–294. Pp. 590–592.

(b) Nor is § 924(e) limited to the common-law definition of "burglary"—*i. e.*, a breaking and entering of a dwelling at night with intent to commit a felony. Since that definition has been expanded in most States to include entry without a "breaking," structures other than dwellings, daytime offenses, intent to commit crimes other than felonies, etc., the modern crime has little in common with its common-law ancestor. Moreover, absent a specific indication of congressional intent, a definition so obviously ill suited to the statutory purpose of controlling violent crimes by career offenders cannot be read into § 924(e). The definition's arcane distinctions have little relevance to modern law enforcement concerns, and, because few of the crimes now recognized as burglaries would fall within the definition, its adoption would come close to nullifying the effect of the statutory term "burglary." Under these circumstances, the general rule of lenity does not require adoption of the common-law definition. Pp. 592–596.

(c) Section 924(e) is not limited to those burglaries that involve especially dangerous conduct, such as first-degree or aggravated burglaries. If that were Congress' intent, there would have been no reason to add the word "burglary" to § 924(e)(2)(B)(ii), since that provision already includes *any* crime that "involves conduct that presents a serious potential risk" of harm to persons. It is more likely that Congress thought that burglary and the other specified offenses so often presented a risk of personal injury or were committed by career criminals that they should be included even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person. Moreover, the choice of the unqualified language "*is* burglary . . . or otherwise involves" dangerous conduct indicates that Congress thought that ordinary burglaries, as well as those involving especially dangerous elements, should be included. Pp. 596–597.

(d) There thus being no plausible alternative, Congress meant by "burglary" the generic sense in which the term is now used in most States' criminal codes. The fact that this meaning is practically identical to the omitted statutory definition is irrelevant. That definition was not explicitly replaced with a different or narrower one, and the legislative history discloses that no alternative was ever discussed. The omission therefore implies, at most, that Congress simply did not wish to specify an exact formulation. Pp. 598–599.

(e) The sentencing court must generally adopt a formal categorical approach in applying the enhancement provision, looking only to the fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts. That approach is required, since, when read in context, § 924(e)(2)(B)(ii)'s "is burglary" phrase most likely refers to the statutory elements of the offense rather than to the

facts of the defendant's conduct; since the legislative history reveals a general categorical approach to predicate offenses; and since an elaborate factfinding process regarding the defendant's prior offenses would be impracticable and unfair. The categorical approach, however, would still permit the sentencing court to go beyond the mere fact of conviction in the narrow range of cases in which the indictment or information and the jury instructions actually required the jury to find all of the elements of generic burglary even though the defendant was convicted under a statute defining burglary in broader terms. Pp. 599–602.

(f) The judgment must be vacated and the case remanded for further proceedings, since, at the time of Taylor's convictions, most but not all of the Missouri second-degree burglary statutes included all the elements of generic burglary, and it is not apparent from the sparse record which of those statutes were the bases for the convictions. P. 602.

864 F. 2d 625, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in all but Part II of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 603.

Bruce Dayton Livingston, by appointment of the Court, 493 U. S. 952, argued the cause for petitioner. With him on the briefs was *J. Bennett Clark*.

Michael R. Lazerwitz argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Bryson*, *Assistant Attorney General Dennis*, and *Andrew Levchuk*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the meaning of the word "burglary" as it is used in § 1402 of Subtitle I (the Career Criminals Amendment Act of 1986) of the Anti-Drug Abuse Act of 1986, 18 U. S. C. § 924(e). This statute provides a sentence enhancement for a defendant who is convicted under 18 U. S. C. § 922(g) (unlawful possession of a

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**Burton H. Shostak* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

firearm) and who has three prior convictions for specified types of offenses, including "burglary."

I

Under 18 U. S. C. § 922(g)(1), it is unlawful for a person who has been convicted previously for a felony to possess a firearm. A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e):

> "(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both . . . such person shall be fined not more than $25,000 and imprisoned not less than fifteen years . . . .
>
> "(2) As used in this subsection—
>
> . . . . .
>
> "(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

In January 1988, in the United States District Court for the Eastern District of Missouri, petitioner Arthur Lajuane Taylor pleaded guilty to one count of possession of a firearm by a convicted felon, in violation of § 922(g)(1). At the time of his plea, Taylor had four prior convictions. One was for robbery, one was for assault, and the other two were for second-degree burglary under Missouri law.[1]

[1] Taylor's burglary convictions were in Missouri state courts in 1963 and 1971. In those years, Missouri had seven different statutes under which one could be charged with second-degree burglary. All seven offenses required entry into a structure, but they varied as to the type of structure

The Government sought sentence enhancement under § 924(e). Taylor conceded that his robbery and assault convictions properly could be counted as two of the three prior convictions required for enhancement, because they involved the use of physical force against persons, under § 924(e)(2)(B)(i). Taylor contended, however, that his burglary convictions should not count for enhancement, because they did not involve "conduct that presents a serious potential risk of physical injury to another," under § 924(e)(2)(B)(ii). His guilty plea was conditioned on the right to appeal this issue. The District Court, pursuant to § 924(e)(1), sentenced Taylor to 15 years' imprisonment without possibility of parole.

The United States Court of Appeals for the Eighth Circuit, by a divided vote, affirmed Taylor's sentence. It ruled that, because the word "burglary" in § 924(e)(2)(B)(ii) "means 'burglary' however a state chooses to define it," the District Court did not err in using Taylor's Missouri convictions for second-degree burglary to enhance his sentence. 864 F. 2d 625, 627 (1989). The majority relied on their court's earlier decision in *United States* v. *Portwood*, 857 F. 2d 1221 (1988), cert. denied, 490 U. S. 1069 (1989). We granted certiorari, 493 U. S. 889 (1989), to resolve a conflict among the Courts of

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and the means of entry involved. See Mo. Rev. Stat. § 560.045 (1969) (breaking and entering a dwelling house); § 560.050 (having entered a dwelling house, breaking out of it); §§ 560.055 and 560.060 (breaking an inner door); § 560.070 (breaking and entering a building, booth, tent, boat, or railroad car); § 560.075 (breaking and entering a bank); and § 560.080 (breaking and entering a vacant building).

In 1979, all these statutes were replaced with Mo. Rev. Stat. § 569.170 (1986), which provides that a person commits second-degree burglary "when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein."

The formal Notice of Punishment Enhancement submitted to the District Court in this case did not reveal which of the seven earlier Missouri statutes were the bases for Taylor's convictions; it stated only that he was convicted of burglary in the second degree. App. 6–7.

Appeals concerning the definition of burglary for purposes of § 924(e).[2]

The word "burglary" has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways. See *United States* v. *Hill*, 863 F. 2d 1575, 1582, and n. 5 (CA11 1989) (surveying a number of burglary statutes). On the face of the federal enhancement provision, it is not readily apparent whether Congress intended "burglary" to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement. And if Congress intended that a uniform definition of burglary be applied, was that definition to be the traditional common-law definition,[3] or one of the broader "generic" definitions articulated in the Model Penal Code and in a predecessor statute to § 924(e), or some other definition specifically tailored to the purposes of the enhancement statute?

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[2] See, *e. g.*, *United States* v. *Leonard*, 868 F. 2d 1393 (CA5 1989) (burglary defined according to state law); 864 F. 2d 625 (CA8 1989) (this case—same); *United States* v. *Chatman*, 869 F. 2d 525 (CA9 1989) (common-law definition of burglary); *United States* v. *Headspeth*, 852 F. 2d 753 (CA4 1988) (same); *United States* v. *Palmer*, 871 F. 2d 1202 (CA3), cert. denied, 493 U. S. 890 (1989) (burglary means any offense that would have met the definition of burglary under a predecessor statute to § 924(e)); *United States* v. *Taylor*, 882 F. 2d 1018 (CA6 1989) (same); *United States* v. *Dombrowski*, 877 F. 2d 520 (CA7 1989) (same); *United States* v. *Hill*, 863 F. 2d 1575 (CA11 1989) (same); and *United States* v. *Patterson*, 882 F. 2d 595 (CA1 1989) (case-by-case inquiry whether the crime defined by state statute involves conduct that presents a serious potential risk of injury to another).

[3] "Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." W. LaFave & A. Scott, Substantive Criminal Law § 8.13, p. 464 (1986) (LaFave & Scott). See 4 W. Blackstone, Commentaries *224.

II

Before examining these possibilities, we think it helpful to review the background of § 924(e). Six years ago, Congress enacted the first version of the sentence-enhancement provision. Under the Armed Career Criminal Act of 1984, Pub. L. 98–473, ch. 18, 98 Stat. 2185, 18 U. S. C. App. § 1202(a) (1982 ed., Supp. III) (repealed in 1986 by Pub. L. 99–308, § 104(b), 100 Stat. 459), any convicted felon found guilty of possession of a firearm, who had three previous convictions "for robbery or burglary," was to receive a mandatory minimum sentence of imprisonment for 15 years. Burglary was defined in the statute itself as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." § 1202(c)(9).

The Act was intended to supplement the States' law enforcement efforts against "career" criminals. The House Report accompanying the Act explained that a "large percentage" of crimes of theft and violence "are committed by a very small percentage of repeat offenders," and that robbery and burglary are the crimes most frequently committed by these career criminals. H. R. Rep. No. 98–1073, pp. 1, 3 (1984) (H. Rep.); see also S. Rep. No. 98–190, p. 5 (1983) (S. Rep.). The House Report quoted the sponsor of the legislation, Senator Specter, who found burglary one of the "most damaging crimes to society" because it involves "invasion of [victims'] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions." H. Rep., at 3. Similarly, the Senate Report stated that burglary was included because it is one of "the most common violent street crimes," and "[w]hile burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises." S. Rep., at 4–5.

The only explanation of why Congress chose the specific definition of burglary included in § 1202 appears in the Senate Report:

> "Because of the wide variation among states and localities in the ways that offenses are labeled, the absence of definitions raised the possibility that culpable offenders might escape punishment on a technicality. For instance, the common law definition of burglary includes a requirement that the offense be committed during the nighttime and with respect to a dwelling. However, for purposes of this Act, such limitations are not appropriate. Furthermore, in terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases." S. Rep., at 20.

In 1986, § 1202 was recodified as 18 U. S. C. § 924(e) by the Firearms Owners' Protection Act, Pub. L. 99–308, § 104, 100 Stat. 458. The definition of burglary was amended slightly, by replacing the words "any felony" with "any crime punishable by a term of imprisonment exceeding one year and . . . ."

Only five months later, § 924(e) again was amended, into its present form, by § 1402 of Subtitle I (the Career Criminals Amendment Act of 1986) of the Anti-Drug Abuse Act of 1986, 100 Stat. 3207–39. This amendment effected three changes that, taken together, give rise to the problem presented in this case. It expanded the predicate offenses triggering the sentence enhancement from "robbery or burglary" to "a violent felony or a serious drug offense"; it defined the term "violent felony" to include "burglary"; and it deleted the pre-existing definition of burglary.

The legislative history is silent as to Congress' reason for deleting the definition of burglary. It does reveal, however, the general purpose and approach of the Career Criminals Amendment Act of 1986. Two bills were proposed; from

these the current statutory language emerged as a compromise. The first bill, introduced in the Senate by Senator Specter and in the House by Representative Wyden, provided that any "crime of violence" would count toward the three prior convictions required for a sentence enhancement, and defined "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." S. 2312, 99th Cong., 2d Sess. (1986); H. R. 4639, 99th Cong., 2d Sess. (1986). The second bill, introduced in the House by Representatives Hughes and McCollum, took a narrower approach, restricting the crimes that would count toward enhancement to "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." H. R. 4768, 99th Cong., 2d Sess. (1986).

When Senator Specter introduced S. 2312 in the Senate, he stated that since the enhancement provision had been in effect for a year and a half, and "has been successful with the basic classification of robberies and burglaries as the definition for 'career criminal,' the time has come to broaden that definition so that we may have a greater sweep and more effective use of this important statute." 132 Cong. Rec. 7697 (1986). Similarly, during the House and Senate hearings on the bills, the witnesses reiterated the concerns that prompted the original enactment of the enhancement provision in 1984: the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem. See Armed Career Criminal Legislation: Hearing on H. R. 4639 and H. R. 4768 before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (House Hearing); Armed Career Criminal Act Amendments:

Hearing on S. 2312 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (Senate Hearing). The issue under consideration was uniformly referred to as "expanding" the range of predicate offenses. House Hearing, at 8 ("[A]ll of us want to see the legislation expanded to other violent offenders and career drug dealers") (statement of Rep. Wyden); *id.*, at 11 ("I think we can all agree that we should expand the predicate offenses") (statement of Rep. Hughes); *id.*, at 14 (statement of Deputy Assistant Attorney General James Knapp); *id.*, at 32–33 (statement of Bruce Lyons, President-elect of National Association of Criminal Defense Lawyers); *id.*, at 44 (statement of Sen. Specter); Senate Hearing, at 1 ("The time seems ripe in many quarters, including the Department of Justice, to expand the armed career criminal bill to include other offenses") (statement of Sen. Specter); *id.*, at 15 (statement of United States Attorney Edward S. G. Dennis, Jr.); *id.*, at 20 (statement of David Dart Queen of the Department of the Treasury); *id.*, at 49 and 55 (statement of Ronald D. Castille, District Attorney, Philadelphia).

Witnesses criticized the narrower bill, H. R. 4768, for excluding property crimes, pointing out that some such crimes present a serious risk of harm to persons, and that the career offenders at whom the enhancement provision is aimed often specialize in property crimes, especially burglary. See House Hearing, at 9 and 12 ("I would hope . . . that at least some violent felonies against property could be included"; "people . . . make a full-time career and commit hundreds of burglaries") (statements of Rep. Wyden); *id.*, at 49–53 (statement of Mr. Castille). The testimony of Mr. Knapp focused specifically on whether the enhancement provision should include burglary as a predicate offense. He criticized H. R. 4768 for excluding "such serious felonies against property as most burglary offenses" and thus "inadvertently narrow[ing] the scope of the present Armed Career Criminal Act," and went on to say:

> "Now the question has been raised, well, what crimes against property should be included? We think, burglary, of course; arson; extortion; and various explosives offenses. . . .
>
> "The one problem I see in using a specific generic term like burglary or arson—that's fine for those statutes—but a lot of these newer explosive offenses don't have a single generic term that covers them, and that is something that the committee may want to be very careful about in coming up with the final statutory language.
>
> "It is these crimes against property—which are inherently dangerous—that we think should be considered as predicate offenses." House Hearing, at 15.

In response to a question by Representative Hughes as to the justification for retaining burglary as a predicate offense, Mr. Knapp explained that "your typical career criminal is most likely to be a burglar," and that "even though injury is not an element of the offense, it is a potentially very dangerous offense, because when you take your very typical residential burglary or even your professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises." *Id.*, at 26. He qualified his remarks, however, by saying: "Obviously, we would not consider, as prior convictions, what I would call misdemeanor burglaries, or your technical burglaries, or anything like that." *Ibid.*

Representative Hughes put the same question to the next witness, Mr. Lyons. The witness replied:

> "When you use burglary, burglary is going back to really what the original legislative history and intent was, to get a hold of the profit motive and to the recidivist armed career criminal. The NACDL really has no problem with burglary as a predicate offense." *Id.*, at 38.

In his prepared statement for the Subcommittee, the witness had noted that H. R. 4768 "would not appear to encompass

. . . burglary," and that "[i]f the Subcommittee concludes that it can accept no retreat from current law, we would suggest that the preservation of burglary as a prior offense be accomplished simply by retaining 'burglary' . . . rather than by substituting for it the all-inclusive 'crime of violence' definition proposed in H. R. 4639." House Hearing, at 34.

H. R. 4639, on the other hand, was seen as too broad. See *id.*, at 11 ("[I]t is important to prioritize offenses") (statement of Rep. Hughes); *id.*, at 16 ("[T]he answer probably lies somewhere between the two bills") (statement of Mr. Knapp). The hearing concluded with a statement by Representative Hughes, a sponsor of the narrower bill, H. R. 4768:

> "Frankly, I think on the question of burglaries, I can see the arguments both ways. We have already included burglaries.
>
> "My leanings would be to leave it alone; it is in the existing law; it was the existing statute. We can still be specific enough. We are talking about burglaries that probably are being carried out by an armed criminal, because the triggering mechanism is that they possess a weapon . . . . So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm." House Hearing, at 41.

After the House hearing, the Subcommittee drafted a compromise bill, H. R. 4885. This bill included "violent felony" as a predicate offense, and provided that

> "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that—
>
> "(i) has as an element the use, attempted use, or threatened use of force against the person of another; or
>
> "(ii) involves conduct that presents a serious potential risk of physical injury to another."

H. R. 4885 was favorably reported by the House Committee on the Judiciary. H. R. Rep. No. 99–849 (1986). The Report explained:

> "The Subcommittee on Crime held a hearing . . . to consider whether it should expand the predicate offenses (robbery and burglary) in existing law in order to add to its effectiveness. At this hearing a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses . . . and violent felonies, generally. This concept was encompassed in H. R. 4885 by deleting the specific predicate offenses for robbery and burglary and adding as predicate offenses [certain drug offenses] and violent felonies . . . .
>
> "The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person" (emphasis in original). *Id.*, at 3.

The provision as finally enacted, however, added to the above-quoted subsection (ii) the phrase that is critical in this case: " . . . *is burglary, arson, or extortion, involves use of explosives, or otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii) (emphasis added).

Some useful observations may be drawn. First, throughout the history of the enhancement provision, Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at

least a potential threat of harm to persons. This concern was not limited to offenders who had actually been convicted of crimes of violence against persons. (Only H. R. 4768, rejected by the House Subcommittee, would have restricted the predicate offenses to crimes actually involving violence against persons.)

The legislative history also indicates that Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape. Congress apparently thought that all burglaries serious enough to be punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence and that were likely to be committed by career criminals. There never was any proposal to limit the predicate offense to some special subclass of burglaries that might be especially dangerous, such as those where the offender is armed, or the building is occupied, or the crime occurs at night.[4]

Second, the enhancement provision always has embodied a categorical approach to the designation of predicate offenses. In the 1984 statute, "robbery" and "burglary" were defined in the statute itself, not left to the vagaries of state law. See 18 U. S. C. App. §§ 1202(c)(8) and (9) (1982 ed., Supp. III). Thus, Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled "robbery" or "burglary"

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[4] Some States have first-degree or aggravated-burglary statutes that single out such especially dangerous forms of burglary. See LaFave & Scott §§ 8.13(f), (g), pp. 475–478.

by the laws of the State of conviction. Each of the proposed versions of the 1986 amendment carried forward this categorical approach, extending the range of predicate offenses to all crimes having certain common characteristics—the use or threatened use of force, or the risk that force would be used—regardless of how they were labeled by state law.

Third, the 1984 definition of burglary shows that Congress, at least at that time, had in mind a modern "generic" view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes. See *United States* v. *Hill*, 863 F. 2d, at 1582, n. 5. In adopting this definition, Congress both prevented offenders from invoking the arcane technicalities of the common-law definition of burglary to evade the sentence-enhancement provision, and protected offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction. See S. Rep., at 20.

Nothing in the legislative history of the 1986 amendment shows that Congress was dissatisfied with the 1984 definition. All the testimony and reports read as if the meaning of burglary was undisputed. The debate at the 1986 hearings centered upon whether any property crimes should be included as predicate offenses, and if so, which ones. At the House hearing, the Subcommittee reached a consensus that at least some property crimes, including burglary, should be included, but again there was no debate over the proper definition of burglary. The compromise bill, H. R. 4885, apparently was intended to include burglary, among other serious property offenses, by implication, as a crime that "involves conduct that presents a serious potential risk of physical injury to another." The language added to H. R. 4885 before its enactment seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary.

The legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inad-

vertent casualty of a complex drafting process.[5] In any event, there is nothing in the history to show that Congress intended in 1986 to replace the 1984 "generic" definition of burglary with something entirely different. Although the omission of a pre-existing definition of a term often indicates Congress' intent to reject that definition, see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432 (1987); *Russello* v. *United States*, 464 U. S. 16, 23 (1983), we draw no such inference here.

Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

III

These observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term "burglary."

A

First, we are led to reject the view of the Court of Appeals in this case. It seems to us to be implausible that Congress intended the meaning of "burglary" for purposes of § 924(e) to depend on the definition adopted by the State of conviction. That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence en-

[5] The Senate, on October 5, 1989, passed a bill, S. 1711, 101st Cong., 1st Sess., that would add to § 924(e)(2) a definition of burglary identical to the one deleted in 1986. See 135 Cong. Rec. 23613 (1989). In introducing the bill, Senator Biden explained that the amendment

"corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacts the original definition which was intended to be broader than common law burglary." *Id.*, at 23519.

This bill is pending in the House.

hancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct "burglary."

For example, Michigan has no offense formally labeled "burglary." It classifies burglaries into several grades of "breaking and entering." See Mich. Comp. Laws § 750.110 (1979). In contrast, California defines "burglary" so broadly as to include shoplifting and theft of goods from a "locked" but unoccupied automobile. See Cal. Penal Code Ann. § 459 (West Supp. 1990); *United States* v. *Chatman*, 869 F. 2d 525, 528–529, and n. 2 (CA9 1989) (entry through unsecured window of an unoccupied auto, and entry of a store open to the public with intent to commit theft, are "burglary" under California law); see also Tex. Penal Code Ann. §§ 30.01–30.05 (1989 and Supp. 1990) (defining burglary to include theft from coin-operated vending machine or automobile); *United States* v. *Leonard*, 868 F. 2d 1393, 1395, n. 2 (CA5 1989), cert. pending, No. 88–1885.

Thus, a person imprudent enough to shoplift or steal from an automobile in California would be found, under the Ninth Circuit's view, to have committed a burglary constituting a "violent felony" for enhancement purposes—yet a person who did so in Michigan might not. Without a clear indication that with the 1986 amendment Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses, we do not interpret Congress' omission of a definition of "burglary" in a way that leads to odd results of this kind. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 119–120 (1983) (absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control"); *United States* v. *Turley*, 352 U. S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute,

the meaning of the federal statute should not be dependent on state law").

This Court's response to the similar problem of interpreting the term "extortion" in the Travel Act, 18 U. S. C. § 1952, is instructive:

> "Appellees argue that Congress' decision not to define extortion combined with its decision to prohibit only extortion in violation of state law compels the conclusion that peculiar versions of state terminology are controlling . . . . The fallacy of this contention lies in its assumption that, by defining extortion with reference to state law, Congress also incorporated state labels for particular offenses. Congress' intent was to aid local law enforcement officials, not to eradicate only those extortionate activities which any given State denominated extortion. . . . Giving controlling effect to state classifications would result in coverage under § 1952 if appellees' activities were centered in Massachusetts, Michigan, or Oregon, but would deny coverage in Indiana, Kansas, Minnesota, or Wisconsin although each of these States prohibits identical criminal activities." *United States* v. *Nardello*, 393 U. S. 286, 293–294 (1969).

We think that "burglary" in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes.

B

Some Courts of Appeals, see n. 2, *supra*, have ruled that § 924(e) incorporates the common-law definition of burglary, relying on the maxim that a statutory term is generally presumed to have its common-law meaning. See *Morissette* v. *United States*, 342 U. S. 246, 263 (1952). This view has some appeal, in that common-law burglary is the core, or common denominator, of the contemporary usage of the term. Almost all States include a breaking and entering of a dwelling at night, with intent to commit a felony, among their

definitions of burglary. Whatever else the Members of Congress might have been thinking of, they presumably had in mind at least the "classic" common-law definition when they considered the inclusion of burglary as a predicate offense.

The problem with this view is that the contemporary understanding of "burglary" has diverged a long way from its common-law roots. Only a few States retain the common-law definition, or something closely resembling it.[6] Most other States have expanded this definition to include entry without a "breaking," structures other than dwellings, offenses committed in the daytime, entry with intent to commit a crime other than a felony, etc. See LaFave & Scott, *supra*, n. 3, §§ 8.13(a) through (f), pp. 464–475. This statutory development, "when viewed in totality, has resulted in a modern crime which has little in common with its common-law ancestor except for the title of burglary." *Id.*, at § 8.13(g), p. 476.

Also, interpreting "burglary" in § 924(e) to mean common-law burglary would not comport with the purposes of the enhancement statute. The arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns.[7] It seems unlikely that the

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[6] See, *e. g.*, Md. Ann. Code, Art. 27, § 30 (1987); Mass. Gen. Laws, ch. 266, § 15 (1990); Miss. Code Ann. § 97–17–19 (1972); W. Va. Code § 61–3–11 (1989).

[7] Consider Blackstone's exposition of one of the elements of burglary:

"The *time* must be by night, and not by day: for in the day time there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep

Members of Congress, immersed in the intensely practical concerns of controlling violent crime, would have decided to abandon their modern, generic 1984 definition of burglary and revert to a definition developed in the ancient English law—a definition mentioned nowhere in the legislative history. Moreover, construing "burglary" to mean common-law burglary would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition.

It could be argued, of course, that common-law burglary, by and large, involves a greater "potential risk of physical injury to another." § 924(e)(2)(B)(ii). But, even assuming that Congress intended to restrict the predicate offense to some especially dangerous subclass of burglaries, restricting it to common-law burglary would not be a rational way of doing so. The common-law definition does not require that the offender be armed or that the dwelling be occupied at the time of the crime. An armed burglary of an occupied commercial building, in the daytime, would seem to pose a far greater risk of harm to persons than an unarmed nocturnal breaking and entering of an unoccupied house. It seems unlikely that Congress would have considered the latter, but not the former, to be a "violent felony" counting towards a sentence enhancement. In the absence of any specific indication that Congress meant to incorporate the common-law meaning of burglary, we shall not read into the statute a definition of "burglary" so obviously ill suited to its purposes.

This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's pur-

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has disarmed the owner, and rendered his castle defenceless." 4 W. Blackstone, Commentaries *224.

See also *id.*, at *224–*228 (burglary must be of a "*mansion*-house," must involve a breaking and entering, and must be with intent to commit a felony).

pose. In *Perrin* v. *United States*, 444 U. S. 37 (1979), this Court rejected the argument that the Travel Act incorporated the common-law definition of "bribery" because, by 1961 when the Act was passed,

> "the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions. In 42 States and in federal legislation, 'bribery' included the bribery of individuals acting in a private capacity. It was against this background that the Travel Act was passed.
>
> . . . . . .
>
> " . . . The record of the hearings and floor debates discloses that Congress made no attempt to define the statutory term 'bribery,' but relied on the accepted contemporary meaning" (footnote omitted). *Id.*, at 45.

For this reason, the Court concluded that "the generic definition of bribery, rather than a narrow common-law definition, was intended by Congress." *Id.*, at 49. Similarly, in *United States* v. *Nardello*, 393 U. S. 286 (1969), this Court held that the Travel Act did not incorporate the common-law definition of "extortion," because that definition had been expanded in many States by the time the Act was passed, *id.*, at 289, and because such an interpretation would conflict with the Act's purpose to curb the activities of organized crime. *Id.*, at 293. The Court therefore declined the give the term an "unnaturally narrow reading," and concluded that the defendants' acts fell within "the generic term extortion as used in the Travel Act." *Id.*, at 296. See also *Bell* v. *United States*, 462 U. S. 356, 362 (1983) (common-law limitation on meaning of "larceny" not incorporated in Bank Robbery Act because "[t]he congressional goal of protecting bank assets is entirely independent of the traditional distinction on which [the defendant] relies"); *United States* v. *Turley*, 352 U. S., at 416–417 (application of National Motor Vehicle Theft Act not limited to "situations which at common law would be considered larceny" because "[p]rofessional thieves resort to in-

numerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion").

Petitioner argues that the narrow common-law definition of burglary would comport with the rule of lenity—that criminal statutes, including sentencing provisions, are to be construed in favor of the accused. See *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980); *Simpson* v. *United States*, 435 U. S. 6, 14–15 (1978). This maxim of statutory construction, however, cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term. See *Perrin* v. *United States*, 444 U. S., at 49, n. 13.

C

Petitioner suggests another narrowing construction of the term "burglary," more suited to the purpose of the enhancement statute:

> "Burglary is any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense that has as an element necessary for conviction conduct that presents a serious risk of physical injury to another." Brief for Petitioner 29.

As examples of burglary statutes that would fit this definition, petitioner points to first-degree or aggravated-burglary statutes having elements such as entering an occupied building; being armed with a deadly weapon; or causing or threatening physical injury to a person. See n. 4, *supra*. This definition has some appeal, because it avoids the arbitrariness of the state-law approach, by restricting the predicate offense in a manner congruent with the general purpose of the enhancement statute.

We do not accept petitioner's proposal, however, for two reasons. First, it is not supported by the language of the

statute or the legislative history. Petitioner essentially asserts that Congress meant to include as predicate offenses only a subclass of burglaries whose elements include "conduct that presents a serious risk of physical injury to another," over and above the risk inherent in ordinary burglaries. But if this were Congress' intent, there would have been no reason to add the word "burglary" to § 924(e)(2)(B)(ii), since that provision already includes *any* crime that "involves conduct that presents a serious potential risk of physical injury to another." We must assume that Congress had a purpose in adding the word "burglary" to H. R. 4885 before enacting it into law. The most likely explanation, in view of the legislative history, is that Congress thought that certain general categories of property crimes—namely burglary, arson, extortion, and the use of explosives—so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person.

Second, if Congress had meant to include only an especially dangerous subclass of burglaries as predicate offenses, it is unlikely that it would have used the unqualified language "*is* burglary . . . or otherwise involves conduct that presents a serious potential risk" in § 924(e)(2)(B)(ii) (emphasis added). Congress presumably realized that the word "burglary" is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force. This choice of language indicates that Congress thought ordinary burglaries, as well as burglaries involving some element making them especially dangerous, presented a sufficiently "serious potential risk" to count toward enhancement.

D

We therefore reject petitioner's view that Congress meant to include only a special subclass of burglaries, either those that would have been burglaries at common law, or those that involve especially dangerous conduct. These limiting constructions are not dictated by the rule of lenity. See *supra*, at 596. We believe that Congress meant by "burglary" the generic sense in which the term is now used in the criminal codes of most States. See *Perrin*, 444 U. S., at 45; *Nardello*, 393 U. S., at 289.

Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.[8] See LaFave & Scott, *supra*, n. 3, § 8.13(a), p. 466 (modern statutes "generally require that the entry be unprivileged"); *id.*, § 8.13(c), p. 471 (modern statutes "typically describe the place as a 'building' or 'structure'"); *id.*, § 8.13(e), p. 474 ("[T]he prevailing view in the modern codes is that an intent to commit any offense will do").

This generic meaning, of course, is practically identical to the 1984 definition that, in 1986, was omitted from the enhancement provision. The 1984 definition, however, was not explicitly replaced with a different or narrower one; the legislative history discloses that no alternative definition of burglary was ever discussed. As we have seen, there simply is no plausible alternative that Congress could have had in mind. The omission of a definition of burglary in the 1986

[8] This usage approximates that adopted by the drafters of the Model Penal Code:

"A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." American Law Institute, Model Penal Code § 221.1 (1980).

Act therefore implies, at most, that Congress did not wish to specify an exact formulation that an offense must meet in order to count as "burglary" for enhancement purposes.

We conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

IV

There remains the problem of applying this conclusion to cases in which the state statute under which a defendant is convicted varies from the generic definition of "burglary." If the state statute is narrower than the generic view, *e. g.*, in cases of burglary convictions in common-law States or convictions of first-degree or aggravated burglary, there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary. And if the defendant was convicted of burglary in a State where the generic definition has been adopted, with minor variations in terminology, then the trial court need find only that the state statute corresponds in substance to the generic meaning of burglary.

A few States' burglary statutes, however, as has been noted above, define burglary more broadly, *e. g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings. One of Missouri's second-degree burglary statutes in effect at the times of petitioner Taylor's convictions included breaking and entering "any booth or tent, or any boat or vessel, or railroad car." Mo. Rev. Stat. § 560.070 (1969) (repealed). Also, there may be offenses under some States' laws that, while not called "burglary," correspond in substantial part to generic burglary. We therefore must address the question whether, in the case of a defendant who has been convicted under a nongeneric-

burglary statute, the Government may seek enhancement on the ground that he actually committed a generic burglary.[9]

This question requires us to address a more general issue—whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes. The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. See *United States* v. *Chatman*, 869 F. 2d, at 529; *United States* v. *Headspeth*, 852 F. 2d 753, 758–759 (CA4 1988); *United States* v. *Vidaure*, 861 F. 2d 1337, 1340 (CA5 1988), cert. denied, 489 U. S. 1088 (1989); *United States* v. *Sherbondy*, 865 F. 2d 996, 1006–1010 (CA9 1988). We find the reasoning of these cases persuasive.

First, the language of § 924(e) generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions. Section 924(e)(1) refers to "a person who . . . has three previous convictions" for—not a person who has committed—three previous violent felonies or drug offenses. Section 924(e)(2)(B)(i) defines "violent felony" as any crime punishable by imprisonment for more than a year that "has as an element"—not any crime that, in a particular case, involves—the use or threat of force. Read in this context, the phrase "is burglary" in § 924(e)(2)(B)(ii)

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[9] Our present concern is only to determine what offenses should count as "burglaries" for enhancement purposes. The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).

most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct.

Second, as we have said, the legislative history of the enhancement statute shows that Congress generally took a categorical approach to predicate offenses. There was considerable debate over what kinds of offenses to include and how to define them, but no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case. If Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history.

Third, the practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain,

it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

We think the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.[10] This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

We therefore hold that an offense constitutes "burglary" for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to "generic" burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.

In Taylor's case, most but not all the former Missouri statutes defining second-degree burglary include all the elements of generic burglary. See n. 1, *supra*. Despite the Government's argument to the contrary, it is not apparent to us from the sparse record before us which of those statutes were the bases for Taylor's prior convictions. We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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[10] Even if an enhancement is not available under § 924(e), the Government may still present evidence of the defendant's actual prior criminal conduct, to increase his sentence for the § 922(g)(1) violation under the Federal Sentencing Guidelines.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join in the Court's opinion except for Part II, which examines in great detail the statute's legislative history. The examination does not uncover anything useful (*i. e.*, anything that tempts us to alter the meaning we deduce from the text anyway), but that is the usual consequence of these inquiries (and a good thing, too). What is noteworthy, however, is that in this case it is hard to understand what we would have done if we *had* found anything useful. The Court says, correctly, that the statutory term "burglary" has a "generally accepted contemporary meaning" which must be given effect and which may not be modified by the rule of lenity. *Ante*, at 596, 598. But if the meaning is so clear that it cannot be constricted by that venerable canon of construction, surely it is not so ambiguous that it can be constricted by the sundry floor statements, witness testimony, and other legislative incunabula that the Court discusses. Is it conceivable that we look to the legislative history only to determine whether it displays, not a *less* extensive punitive intent than the plain meaning (the domain of the rule of lenity), but a *more* extensive one? If we found a more extensive one, I assume we would then have to apply the rule of lenity, bringing us back once again to the ordinary meaning of the statute. It seems like a lot of trouble.

I can discern no reason for devoting 10 pages of today's opinion to legislative history, except to show that we have given this case close and careful consideration. We must find some better way of demonstrating our conscientiousness.

BURNHAM *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN (BURNHAM, REAL PARTY IN INTEREST)

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 89–44. Argued February 28, 1990—Decided May 29, 1990

During a trip to California to conduct business and visit his children, petitioner Burnham, a New Jersey resident, was served with a California court summons and his estranged wife's divorce petition. The California Superior Court denied his motion to quash the service of process, and the State Court of Appeal denied mandamus relief, rejecting his contention that the Due Process Clause of the Fourteenth Amendment prohibited California courts from asserting jurisdiction over him because he lacked "minimum contacts" with the State. The latter court held it to be a valid predicate for *in personam* jurisdiction that he was personally served while present in the forum State.

Held: The judgment is affirmed.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts II–A, II–B, and II–C that the Due Process Clause does not deny a State's courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State. Pp. 2–12.

(a) To determine whether the assertion of personal jurisdiction is consistent with due process, this Court has long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority. See *Pennoyer* v. *Neff*, 95 U. S. 714, 722. The classic expression of that criterion appeared in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316, which held that a state court's assertion of personal jurisdiction must not violate "traditional notions of fair play and substantial justice." Pp. 608–610.

(b) A formidable body of precedent, stretching from common-law antecedents through decisions at or near the crucial time of the Fourteenth Amendment's adoption to many recent cases, reflects the near-unanimous view that service of process confers state-court jurisdiction over a physically present nonresident, regardless of whether he was only briefly in the State or whether the cause of action is related to his activities there. Pp. 610–616.

(c) Burnham's contention that, in the absence of "continuous and systematic" contacts with the forum, a nonresident defendant can be sub-

jected to judgment only as to matters that arise out of or relate to his contacts with the forum misreads this Court's decisions applying that standard. The standard was developed by *analogy* to the traditional "physical presence" requirement as a means of evaluating novel state procedures designed to do away with that requirement with respect to *in personam* jurisdiction over absent defendants. Nothing in *International Shoe* or the subsequent cases supports the proposition that a defendant's presence in the forum is not only unnecessary to validate such novel assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. Pp. 616–619.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded in Parts II–D and III that:

1. *Shaffer* v. *Heitner*, 433 U. S. 186—which applied the jurisdictional rules developed under *International Shoe* to invalidate a Delaware court's assertion of *quasi in rem* jurisdiction over absent defendants whose sole contact with the State (ownership of property) was unrelated to the suit—does not support Burnham's position. When read in context, *Shaffer*'s statement that "all assertions of state-court jurisdiction must be evaluated according to the *[International Shoe]* standards," 433 U. S., at 212, means only that *quasi in rem* jurisdiction, like other forms of *in personam* jurisdiction over absent defendants, must satisfy the litigation-relatedness requirement. Nothing in *Shaffer* compels the conclusion that physically present defendants must be treated identically to absent ones or expands the "minimum-contacts" requirement beyond situations involving the latter persons. Pp. 619–622.

2. The proposal of JUSTICE BRENNAN's concurrence to apply "contemporary notions of due process" to the constitutional analysis constitutes an outright break with the *International Shoe* standard and, without authority, seeks to measure state-court jurisdiction not only against traditional doctrines and current practice, but also against each Justice's subjective assessment of what is fair and just. In effect, the proposed standard amounts to a "totality of the circumstances" test, guaranteeing uncertainty and unnecessary litigation over the preliminary issue of the forum's competence. Pp. 622–627.

JUSTICE WHITE concluded that the traditionally accepted rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State cannot be invalidated absent a showing that as a general proposition it is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case. Until such a difficult showing is made, claims in individual cases that the rule would operate unfairly as applied to the particular nonresident involved need not be entertained, at least in the usual instance where presence in the forum State is intentional. P. 628.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR, although agreeing that the traditional "transient jurisdiction" rule is generally valid, concluded that historical pedigree, although important, is not the *only* factor to be taken into account in establishing whether a jurisdictional rule satisfies due process, and that an independent inquiry into the fairness of the prevailing in-state service rule must be undertaken. Pp. 628–640.

(a) Reliance solely on historical precedent is foreclosed by *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316, and *Shaffer* v. *Heitner*, 433 U. S. 186, 212, which demonstrate that *all* rules of state-court jurisdiction, even ancient ones such as transient jurisdiction, must satisfy contemporary notions of due process. While *Shaffer*'s *holding* may have been limited to *quasi in rem* jurisdiction, its mode of analysis—which discarded an "ancient form without substantial modern justification"—was not. Minimum-contacts analysis represents a far more sensible construct for the exercise of state-court jurisdiction. Pp. 629–633.

(b) The transient jurisdiction rule will generally satisfy due process requirements. Tradition, although alone not dispositive, is relevant because the fact that American courts have announced the rule since the latter part of the 19th century provides a defendant voluntarily present in a particular State *today* with clear notice that he is subject to suit in that forum. Thus, the rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process. Moreover, by visiting the forum State, a transient defendant actually avails himself of significant benefits provided by the State: police, fire, and emergency services, the freedom to travel its roads and waterways, the enjoyment of the fruits of its economy, the protection of its laws, and the right of access to its courts. Without transient jurisdiction, the latter right would create an asymmetry, since a transient would have the full benefit of the power of the State's courts as a plaintiff while retaining immunity from their authority as a defendant. Furthermore, the potential burdens on a transient defendant are slight in light of modern transportation and communications methods, and any burdens that do arise can be ameliorated by a variety of procedural devices. Pp. 633–640.

JUSTICE STEVENS concluded that the historical evidence, a persisting consensus, considerations of fairness, and common sense all indicate that the judgment should be affirmed. P. 640.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, and in which

WHITE, J., joined as to Parts I, II–A, II–B, and II–C. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 628. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, *post*, p. 628. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 640.

Richard Sherman argued the cause for petitioner. With him on the briefs were *Victoria J. De Goff* and *Cecilia Lannon.*

James O. Devereaux argued the cause for respondent. With him on the brief was *Robert L. Nelson.*

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE KENNEDY join, and in which JUSTICE WHITE joins with respect to Parts I, II–A, II–B, and II–C.

The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.

I

Petitioner Dennis Burnham married Francie Burnham in 1976 in West Virginia. In 1977 the couple moved to New Jersey, where their two children were born. In July 1987 the Burnhams decided to separate. They agreed that Mrs. Burnham, who intended to move to California, would take custody of the children. Shortly before Mrs. Burnham departed for California that same month, she and petitioner agreed that she would file for divorce on grounds of "irreconcilable differences."

In October 1987, petitioner filed for divorce in New Jersey state court on grounds of "desertion." Petitioner did not, however, obtain an issuance of summons against his wife and did not attempt to serve her with process. Mrs. Burnham, after unsuccessfully demanding that petitioner adhere to

their prior agreement to submit to an "irreconcilable differences" divorce, brought suit for divorce in California state court in early January 1988.

In late January, petitioner visited southern California on business, after which he went north to visit his children in the San Francisco Bay area, where his wife resided. He took the older child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham's home on January 24, 1988, petitioner was served with a California court summons and a copy of Mrs. Burnham's divorce petition. He then returned to New Jersey.

Later that year, petitioner made a special appearance in the California Superior Court, moving to quash the service of process on the ground that the court lacked personal jurisdiction over him because his only contacts with California were a few short visits to the State for the purposes of conducting business and visiting his children. The Superior Court denied the motion, and the California Court of Appeal denied mandamus relief, rejecting petitioner's contention that the Due Process Clause prohibited California courts from asserting jurisdiction over him because he lacked "minimum contacts" with the State. The court held it to be "a valid jurisdictional predicate for *in personam* jurisdiction" that the "defendant [was] present in the forum state and personally served with process." App. to Pet. for Cert. 5. We granted certiorari. 493 U. S. 807 (1989).

II

A

The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser* v. *Collins*, Y. B. Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng. Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng. Rep. 1027, 1041 (K. B. 1612). Traditionally that proposition was embodied in the phrase *coram non judice*,

"before a person not a judge"—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. See, *e. g.*, *Grumon* v. *Raymond*, 1 Conn. 40 (1814); *Picquet* v. *Swan*, 19 F. Cas. 609 (No. 11,134) (CC Mass. 1828); *Dunn* v. *Dunn*, 4 Paige 425 (N. Y. Ch. 1834); *Evans* v. *Instine*, 7 Ohio 273 (1835); *Steel* v. *Smith*, 7 Watts & Serg. 447 (Pa. 1844); *Boswell's Lessee* v. *Otis*, 9 How. 336, 350 (1850). In *Pennoyer* v. *Neff*, 95 U. S. 714, 732 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority. That criterion was first announced in *Pennoyer* v. *Neff*, *supra*, in which we stated that due process "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," *id.*, at 733, including the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property," *id.*, at 722. In what has become the classic expression of the criterion, we said in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), that a state court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate "'traditional notions of fair play and substantial justice.'" *Id.*, at 316, quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940). See also *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 703 (1982). Since *International Shoe*, we have only been called upon to decide whether these "traditional notions" per-

mit States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century. We have held such deviations permissible, but only with respect to suits arising out of the absent defendant's contacts with the State.[1] See, *e. g.*, *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S. 408, 414 (1984). The question we must decide today is whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.

B

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter

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[1] We have said that "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S., at 414. Our only holding supporting that statement, however, involved "regular service of summons upon [the corporation's] president while he was in [the forum State] acting in that capacity." See *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 440 (1952). It may be that whatever special rule exists permitting "continuous and systematic" contacts, *id.*, at 438, to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon "de facto power over the defendant's person." *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). We express no views on these matters—and, for simplicity's sake, omit reference to this aspect of "contacts"-based jurisdiction in our discussion.

judgment against him, no matter how fleeting his visit. See, *e. g.*, *Potter* v. *Allin*, 2 Root 63, 67 (Conn. 1793); *Barrell* v. *Benjamin*, 15 Mass. 354 (1819). That view had antecedents in English common-law practice, which sometimes allowed "transitory" actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England. See, *e. g.*, *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (K. B. 1774); *Cartwright* v. *Pettus*, 22 Eng. Rep. 916 (Ch. 1675). Justice Story believed the principle, which he traced to Roman origins, to be firmly grounded in English tradition: "[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found," for "every nation may . . . rightfully exercise jurisdiction over all persons within its domains." J. Story, Commentaries on the Conflict of Laws §§ 554, 543 (1846). See also *id.*, §§ 530–538; *Picquet* v. *Swan*, *supra*, at 611–612 (Story, J.) ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him").

Recent scholarship has suggested that English tradition was not as clear as Story thought, see Hazard, A General Theory of State-Court Jurisdiction, 1965 S. Ct. Rev. 241, 253–260; Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289 (1956). Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted. The following passage in a decision of the Supreme Court of Georgia, in an action on a debt having no apparent relation to the defendant's temporary presence in the State, is representative:

> "Can a citizen of Alabama be sued in this State, as he passes through it?

> "Undoubtedly he can. The second of the axioms of *Huberus*, as translated by *Story*, is: 'that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.' *(Stor. Conf. Laws, §29, Note 3.)*
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> ". . . [A] citizen of another State, who is merely passing through this, resides, as he passes, wherever he is. Let him be sued, therefore, wherever he may, he will be sued where he resides.
>
> "The plaintiff in error, although a citizen of Alabama, was passing through the County of Troup, in this State, and whilst doing so, he was sued in Troup. He was liable to be sued in this State, and in Troup County of this State." *Murphy* v. *J. S. Winter & Co.*, 18 Ga. 690, 691–692 (1855).

See also, *e. g.*, *Peabody* v. *Hamilton*, 106 Mass. 217, 220 (1870) (relying on Story for the same principle); *Alley* v. *Caspari*, 80 Me. 234, 236–237, 14 A. 12, 13 (1888) (same).

Decisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there. See, *e. g.*, *Vinal* v. *Core*, 18 W. Va. 1, 20 (1881); *Roberts* v. *Dunsmuir*, 75 Cal. 203, 204, 16 P. 782 (1888); *De Poret* v. *Gusman*, 30 La. Ann., pt. 2, pp. 930, 932 (1878); *Smith* v. *Gibson*, 83 Ala. 284, 285, 3 So. 321 (1887); *Savin* v. *Bond*, 57 Md. 228, 233 (1881); *Hart* v. *Granger*, 1 Conn. 154, 165 (1814); *Mussina* v. *Belden*, 6 Abb. Pr. 165, 176 (N. Y. Sup. Ct. 1858); *Darrah* v. *Watson*, 36 Iowa 116, 120–121 (1872); *Baisley* v. *Baisley*, 113 Mo. 544, 549–550, 21 S. W. 29, 30 (1893); *Bowman* v. *Flint*, 37 Tex. Civ. App. 28, 29, 82 S. W. 1049, 1050 (1904). See also *Reed* v. *Hollister*, 106 Ore. 407, 412–414, 212 P. 367, 369–370 (1923); *Hagen* v. *Viney*, 124 Fla. 747, 751, 169 So. 391, 392–393 (1936); *Vaughn*

v. *Love*, 324 Pa. 276, 280, 188 A. 299, 302 (1936).[2] Although research has not revealed a case deciding the issue in every State's courts, that appears to be because the issue was so well settled that it went unlitigated. See R. Leflar, American Conflicts Law § 24, p. 43 (1968) ("The law is so clear on this point that there are few decisions on it"); Note, Developments in the Law—State Court Jurisdiction, 73 Harv. L. Rev. 909, 937–938 (1960). Opinions from the courts of other States announced the rule in dictum. See, *e. g.*, *Reed* v. *Browning*, 130 Ind. 575, 577, 30 N. E. 704, 705 (1892); *Nathanson* v. *Spitz*, 19 R. I. 70, 72, 31 A. 690, 691 (1895); *McLeod* v. *Connecticut & Passumpsic River R. Co.*, 58 Vt. 727, 733–734, 6 A. 648, 649, 650 (1886); *New Orleans J. & G. N. R. Co.* v. *Wallace*, 50 Miss. 244, 248–249 (1874); *Wagner* v. *Hallack*, 3 Colo. 176, 182–183 (1877); *Downer* v. *Shaw*, 22 N. H. 277, 281 (1851); *Moore* v. *Smith*, 41 Ky. 340, 341 (1842); *Adair County Bank* v. *Forrey*, 74 Neb. 811, 815, 105 N. W. 714, 715–716 (1905). Most States, moreover, had statutes or common-law rules that exempted from service of process individuals who were brought into the forum by force or fraud, see, *e. g.*, *Wanzer* v. *Bright*, 52 Ill. 35 (1869), or who were there as a party or witness in unrelated judicial proceedings, see, *e. g.*, *Burroughs* v. *Cocke & Willis*, 56 Okla. 627, 156 P. 196 (1916); *Malloy* v. *Brewer*, 7 S. D. 587, 64 N. W. 1120 (1895). These exceptions obviously rested upon the premise that service of process conferred jurisdiction. See *Anderson* v. *Atkins*, 161 Tenn. 137, 140, 29 S. W. 2d 248, 249 (1930). Particularly striking is the fact that, as far as we have been able to determine, *not one* American case from the period (or, for that matter, not one American case

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[2] JUSTICE BRENNAN's assertion that some of these cases involved dicta rather than holdings, *post*, at 636–637, n. 10, is incorrect. In each case, personal service within the State was the exclusive basis for the judgment that jurisdiction existed, and no other factor was relied upon. Nor is it relevant for present purposes that these holdings might instead have been rested on other available grounds.

until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction.[3] Commentators were also seemingly unanimous

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[3] Given this striking fact, and the unanimity of both cases and commentators in supporting the in-state service rule, one can only marvel at JUSTICE BRENNAN's assertion that the rule "was rather weakly implanted in American jurisprudence," *post*, at 633–634, and "did not receive wide currency until well after our decision in *Pennoyer* v. *Neff*," *post*, at 635. I have cited pre-*Pennoyer* cases clearly supporting the rule from no less than nine States, ranging from Mississippi to Colorado to New Hampshire, and two highly respected pre-*Pennoyer* commentators. (It is, moreover, impossible to believe that the many other cases decided shortly after *Pennoyer* represented some sort of instant mutation—or, for that matter, that *Pennoyer* itself was not drawing upon clear contemporary understanding.) JUSTICE BRENNAN cites neither cases nor commentators from the relevant period to support his thesis (with exceptions I shall discuss presently), and instead relies upon modern secondary sources that do not mention, and were perhaps unaware of, many of the materials I have discussed. The cases cited by JUSTICE BRENNAN, *post*, at 634–635, n. 9, do not remotely support his point. The dictum he quotes from *Coleman's Appeal*, 75 Pa. 441, 458 (1874), to the effect that "a man shall only be liable to be called on to answer for civil wrongs in the forum of his home, and the tribunal of his vicinage," was addressing the situation where no personal service in the State had been obtained. This is clear from the court's earlier statements that "there is no mode of reaching by any process issuing from a court of common law, the person of a non-resident defendant not found within the jurisdiction," *id.*, at 456, and "[u]pon a summons, unless there is service within the jurisdiction, there can be no judgment for want of appearance against the defendant." *Ibid.* *Gardner* v. *Thomas*, 14 Johns. *134 (N. Y. 1817), and *Molony* v. *Dows*, 8 Abb. Pr. 316 (N. Y. Common Pleas 1859), are irrelevant to the present discussion. *Gardner*, in which the court declined to adjudicate a tort action between two British subjects for a tort that occurred on the high seas aboard a British vessel, specifically affirmed that jurisdiction did exist, but said that its exercise "must, on principles of policy, often rest in the sound discretion of the Court." *Gardner* v. *Thomas*, *supra*, at *137–*138. The decision is plainly based, in modern terms, upon the doctrine of *forum non conveniens*. *Molony* did indeed hold that in-state service could not support the adjudication of an action for physical assault by one Californian against another in California (acknowledging that this appeared to contradict an earlier New York case), but it rested that holding upon a doctrine akin to the principle that no State will

on the rule. See, *e. g.*, 1 A. Freeman, Law of Judgments 470–471 (1873); 1 H. Black, Law of Judgments 276–277 (1891); W. Alderson, Law of Judicial Writs and Process 225–226 (1895). See also Restatement of Conflict of Laws §§ 77–78 (1934).

This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government—if one disregards (as one must for this purpose) the few opinions since 1978 that have erroneously said, on grounds similar to those that petitioner presses here, that this Court's due process decisions render the practice unconstitutional. See *Nehemiah* v. *Athletics Congress of U. S. A.*, 765 F. 2d 42, 46–47 (CA3 1985); *Schreiber* v. *Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1088–1091 (Kan. 1978), rev'd on other grounds, 611 F. 2d 790 (CA10 1979); *Harold M. Pitman Co.* v. *Typecraft Software Ltd.*, 626 F. Supp. 305, 310–314 (ND Ill. 1986); *Bershaw* v. *Sarbacher*, 40 Wash. App. 653, 657, 700 P. 2d 347, 349 (1985); *Duehring* v. *Vasquez*, 490 So. 2d 667, 671 (La. App. 1986). We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction. Many recent cases reaffirm it. See *Hutto* v. *Plagens*, 254 Ga. 512,

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enforce the penal laws of another—that is, resting upon the injury to the public peace of the other State that such an assault entails, and upon the fact that the damages awarded include penal elements. *Molony* v. *Dows*, *supra*, at 330. The fairness or propriety of exercising jurisidiction over the parties had nothing to do with the decision, as is evident from the court's acknowledgment that if the Californians were suing one another over a contract dispute jurisdiction would lie, no matter where the contract arose. 8 Abb. Pr., at 328. As for JUSTICE BRENNAN's citation of the 1880 commentator John Cleland Wells, *post*, at 635, n. 9, it suffices to quote what is set forth on the very page cited: "It is held to be a principle of the common law that any non-resident defendant voluntarily coming within the jurisdiction may be served with process, and compelled to answer." 1 J. Wells, Jurisdiction of Courts 76 (1880).

513, 330 S. E. 2d 341, 342 (1985); *Oxmans' Erwin Meat Co.* v. *Blacketer*, 86 Wis. 2d 683, 273 N. W. 2d 285 (1979); *Lockert* v. *Breedlove*, 321 N. C. 66, 361 S. E. 2d 581 (1987); *Nutri-West* v. *Gibson*, 764 P. 2d 693 (Wyo. 1988); *Klavan* v. *Klavan*, 405 Mass. 1105, 1106, 544 N. E. 2d 863, 864 (1989); *Nielsen* v. *Braland*, 264 Minn. 481, 483, 484, 119 N. W. 2d 737, 738 (1963); *Read* v. *Sonat Offshore Drilling, Inc.*, 515 So. 2d 1229, 1230 (Miss. 1987); *Cariaga* v. *Eighth Judicial District Court*, 104 Nev. 544, 762 P. 2d 886 (1988); *El-Maksoud* v. *El-Maksoud*, 237 N. J. Super. 483, 486–490, 568 A. 2d 140, 142–144 (1989); *Carr* v. *Carr*, 180 W. Va. 12–14, 375 S. E. 2d 190, 192 (1988); *O'Brien* v. *Eubanks*, 701 P. 2d 614, 616 (Colo. App. 1985); *Wolfson* v. *Wolfson*, 455 So. 2d 577, 578 (Fla. App. 1984); *In re Marriage of Pridemore*, 146 Ill. App. 3d 990, 991–992, 497 N. E. 2d 818, 819–820 (1986); *Swarts* v. *Dean*, 13 Kan. App. 2d 228, 766 P. 2d 1291, 1292 (1989).

C

Despite this formidable body of precedent, petitioner contends, in reliance on our decisions applying the *International Shoe* standard, that in the absence of "continuous and systematic" contacts with the forum, see n. 1, *supra*, a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum. This argument rests on a thorough misunderstanding of our cases.

The view of most courts in the 19th century was that a court simply could not exercise *in personam* jurisdiction over a nonresident who had not been personally served with process in the forum. See, *e. g.*, *Reber* v. *Wright*, 68 Pa. 471, 476–477 (1871); *Sturgis* v. *Fay*, 16 Ind. 429, 431 (1861); *Weil* v. *Lowenthal*, 10 Iowa 575, 578 (1860); Freeman, Law of Judgments, *supra*, at 468–470; see also *D'Arcy* v. *Ketchum*, 11 How. 165, 176 (1851); *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58, 61 (1874). *Pennoyer* v. *Neff*, while renowned for its statement of the principle that the Fourteenth Amend-

ment prohibits such an exercise of jurisdiction, in fact set that forth only as dictum and decided the case (which involved a judgment rendered more than two years before the Fourteenth Amendment's ratification) under "well-established principles of public law." 95 U. S., at 722. Those principles, embodied in the Due Process Clause, required (we said) that when proceedings "involv[e] merely a determination of the personal liability of the defendant, he must be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance." *Id.*, at 733. We invoked that rule in a series of subsequent cases, as either a matter of due process or a "fundamental princip[e] of jurisprudence," *Wilson* v. *Seligman*, 144 U. S. 41, 46 (1892). See, *e. g.*, *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 522–523 (1916); *Goldey* v. *Morning News*, 156 U. S. 518, 521 (1895).

Later years, however, saw the weakening of the *Pennoyer* rule. In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations. *Hanson* v. *Denckla*, 357 U. S. 235, 260 (1958) (Black, J., dissenting). States required, for example, that nonresident corporations appoint an in-state agent upon whom process could be served as a condition of transacting business within their borders, see, *e. g.*, *St. Clair* v. *Cox*, 106 U. S. 350 (1882), and provided in-state "substituted service" for nonresident motorists who caused injury in the State and left before personal service could be accomplished, see, *e. g.*, *Kane* v. *New Jersey*, 242 U. S. 160 (1916); *Hess* v. *Pawloski*, 274 U. S. 352 (1927). We initially upheld these laws under the Due Process Clause on grounds that they complied with *Pennoyer*'s rigid requirement of either "consent," see, *e. g.*, *Hess* v. *Pawloski*, *supra*, at 356, or "presence," see, *e. g.*, *Philadelphia & Reading R. Co.* v. *McKibbin*, 243 U. S. 264, 265 (1917). As many ob-

served, however, the consent and presence were purely fictional. See, *e. g.*, 1 J. Beale, Conflict of Laws 360, 384 (1935); *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F. 2d 139, 141 (CA2 1930) (L. Hand, J.). Our opinion in *International Shoe* cast those fictions aside and made explicit the underlying basis of these decisions: Due process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*. The validity of assertion of jurisdiction over a nonconsenting defendant who is not present in the forum depends upon whether "the quality and nature of [his] activity" in relation to the forum, 326 U. S., at 319, renders such jurisdiction consistent with "'traditional notions of fair play and substantial justice.'" *Id.*, at 316 (citation omitted). Subsequent cases have derived from the *International Shoe* standard the general rule that a State may dispense with in-forum personal service on nonresident defendants in suits arising out of their activities in the State. See generally *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S., at 414–415. As *International Shoe* suggests, the defendant's litigation-related "minimum contacts" may take the place of physical presence as the basis for jurisdiction:

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding on him. *Pennoyer* v. *Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U. S., at 316 (citations omitted).

Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence. The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental, as we observed over a century ago:

> "[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. . . . [That which], in substance, has been immemorially the actual law of the land . . . therefor[e] is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado* v. *California*, 110 U. S. 516, 528–529 (1884).

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

D

Petitioner's strongest argument, though we ultimately reject it, relies upon our decision in *Shaffer* v. *Heitner*, 433

U. S. 186 (1977). In that case, a Delaware court hearing a shareholder's derivative suit against a corporation's directors secured jurisdiction *quasi in rem* by sequestering the out-of-state defendants' stock in the company, the situs of which was Delaware under Delaware law. Reasoning that Delaware's sequestration procedure was simply a mechanism to compel the absent defendants to appear in a suit to determine their personal rights and obligations, we concluded that the normal rules we had developed under *International Shoe* for jurisdiction over suits against absent defendants should apply—viz., Delaware could not hear the suit because the defendants' sole contact with the State (ownership of property there) was unrelated to the lawsuit. 433 U. S., at 213–215.

It goes too far to say, as petitioner contends, that *Shaffer* compels the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State. *Shaffer*, like *International Shoe*, involved jurisdiction over an *absent defendant*, and it stands for nothing more than the proposition that when the "minimum contact" that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation. Petitioner wrenches out of its context our statement in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," 433 U. S., at 212. When read together with the two sentences that preceded it, the meaning of this statement becomes clear:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> "We *therefore conclude* that all assertions of state-court jurisdiction must be evaluated according to the

> standards set forth in *International Shoe* and its progeny." *Ibid.* (emphasis added).

Shaffer was saying, in other words, not that all bases for the assertion of *in personam* jurisdiction (including, presumably, in-state service) must be treated alike and subjected to the "minimum contacts" analysis of *International Shoe;* but rather that *quasi in rem* jurisdiction, that fictional "ancient form," and *in personam* jurisdiction, are really one and the same and must be treated alike—leading to the conclusion that *quasi in rem* jurisdiction, *i. e.*, that form of *in personam* jurisdiction based upon a "property ownership" contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe.* The logic of *Shaffer*'s holding—which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact—does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum," 326 U. S., at 316, and nothing in *Shaffer* expands that requirement beyond that.

It is fair to say, however, that while our holding today does not contradict *Shaffer,* our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase "*traditional notions* of fair play and substantial justice" makes clear. *Shaffer* did conduct such an independent inquiry, asserting that "'traditional notions of fair play and substantial justice' can be as readily offended

by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." 433 U. S., at 212. Perhaps that assertion can be sustained when the "perpetuation of ancient forms" is engaged in by only a very small minority of the States.[4] Where, however, as in the present case, a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified." While in no way receding from or casting doubt upon the holding of *Shaffer* or any other case, we reaffirm today our time-honored approach, see, *e. g.*, *Ownbey* v. *Morgan*, 256 U. S. 94, 110–112 (1921); *Hurtado* v. *California*, 110 U. S., at 528–529; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U. S. 272, 276–277 (1856). For new procedures, hitherto unknown, the Due Process clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. *International Shoe*, 326 U. S., at 316. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

III

A few words in response to JUSTICE BRENNAN's opinion concurring in the judgment: It insists that we apply "contemporary notions of due process" to determine the constitutionality of California's assertion of jurisdiction. *Post*, at 632. But our analysis today comports with that prescription, at least if we give it the only sense allowed by our precedents. The "contemporary notions of due process" applicable to per-

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[4] *Shaffer* may have involved a unique state procedure in one respect: JUSTICE STEVENS noted that Delaware was the only State that treated the place of incorporation as the situs of corporate stock when both owner and custodian were elsewhere. See 433 U. S., at 218 (opinion concurring in judgment).

sonal jurisdiction are the enduring "*traditional* notions of fair play and substantial justice" established as the test by *International Shoe*. By its very language, that test is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States.

But the concurrence's proposed standard of "contemporary notions of due process" requires more: It measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just. Authority for that seductive standard is not to be found in any of our personal jurisdiction cases. It is, indeed, an outright break with the test of "traditional notions of fair play and substantial justice," which would have to be reformulated "*our* notions of fair play and substantial justice."

The subjectivity, and hence inadequacy, of this approach becomes apparent when the concurrence tries to explain *why* the assertion of jurisdiction in the present case meets its standard of continuing-American-tradition-*plus*-innate-fairness. JUSTICE BRENNAN lists the "benefits" Mr. Burnham derived from the State of California—the fact that, during the few days he was there, "[h]is health and safety [were] guaranteed by the State's police, fire, and emergency medical services; he [was] free to travel on the State's roads and waterways; he likely enjoy[ed] the fruits of the State's economy." *Post*, at 637–638. Three days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is "fair" for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children. We daresay a contractual exchange swapping those benefits for that power would not survive the "unconscionability" provision of the Uniform Commercial Code. Even less persuasive are the other "fairness" factors alluded to by JUSTICE BRENNAN. It would create "an asymmetry," we are told, if Burnham were *permitted* (as he is) to appear

in California courts as a plaintiff, but were not *compelled* to appear in California courts as defendant; and travel being as easy as it is nowadays, and modern procedural devices being so convenient, it is no great hardship to appear in California courts. *Post*, at 638–639. The problem with these assertions is that they justify the exercise of jurisdiction over *everyone*, *whether or not* he ever comes to California. The only "fairness" elements setting Mr. Burnham apart from the rest of the world are the three days' "benefits" referred to above—and even those, do not set him apart from many other people who have enjoyed three days in the Golden State (savoring the fruits of its economy, the availability of its roads and police services) but who were fortunate enough not to be served with process while they were there and thus are not (simply by reason of that savoring) subject to the general jurisdiction of California's courts. See, *e. g.*, *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S., at 414–416. In other words, even if one agreed with JUSTICE BRENNAN's conception of an equitable bargain, the "benefits" we have been discussing would explain why it is "fair" to assert general jurisdiction over Burnham-returned-to-New-Jersey-after-service only at the expense of proving that it is also "fair" to assert general jurisdiction over Burnham-returned-to-New-Jersey-*without*-service—which we *know* does not conform with "contemporary notions of due process."

There is, we must acknowledge, one factor mentioned by JUSTICE BRENNAN that *both* relates distinctively to the assertion of jurisdiction on the basis of personal in-state service *and* is fully persuasive—namely, the fact that a defendant voluntarily present in a particular State has a "reasonable expectatio[n]" that he is subject to suit there. *Post*, at 637. By formulating it as a "reasonable expectation" JUSTICE BRENNAN makes that seem like a "fairness" factor; but in reality, of course, it is just tradition masquerading as "fairness." The only reason for charging Mr. Burnham with the reasonable expectation of being subject to suit is that the

States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for Mr. Burnham, who voluntarily entered California, to be sued there for divorce—at least "fair" in the limited sense that he has no one but himself to blame. JUSTICE BRENNAN's long journey is a circular one, leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition.

While JUSTICE BRENNAN's concurrence is unwilling to confess that the Justices of this Court can possibly be bound by a continuing American tradition that a particular procedure is fair, neither is it willing to embrace the logical consequences of that refusal—or even to be clear about what consequences (logical or otherwise) it does embrace. JUSTICE BRENNAN says that "[f]or these reasons [*i. e.*, because of the reasonableness factors enumerated above], as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process." *Post*, at 639. The use of the word "rule" conveys the reassuring feeling that he is establishing a principle of law one can rely upon—but of course he is not. Since JUSTICE BRENNAN's only criterion of constitutionality is "fairness," the phrase "as a rule" represents nothing more than his estimation that, *usually*, all the elements of "fairness" he discusses in the present case will exist. But what if they do not? Suppose, for example, that a defendant in Mr. Burnham's situation enjoys not three days' worth of California's "benefits," but 15 minutes' worth. Or suppose we remove one of those "benefits"—"enjoy[ment of] the fruits of the State's economy"—by positing that Mr. Burnham had not

come to California on business, but only to visit his children. Or suppose that Mr. Burnham were demonstrably so impecunious as to be unable to take advantage of the modern means of transportation and communication that JUSTICE BRENNAN finds so relevant. Or suppose, finally, that the California courts lacked the "variety of procedural devices," *post*, at 639, that JUSTICE BRENNAN says can reduce the burden upon out-of-state litigants. One may also make additional suppositions, relating not to the absence of the factors that JUSTICE BRENNAN discusses, but to the presence of additional factors bearing upon the ultimate criterion of "fairness." What if, for example, Mr. Burnham were visiting a sick child? Or a dying child? Cf. *Kulko* v. *Superior Court of California, City and County of San Francisco*, 436 U. S. 84, 93 (1978) (finding the exercise of long-arm jurisdiction over an absent parent unreasonable because it would "discourage parents from entering into reasonable visitation agreements"). Since, so far as one can tell, JUSTICE BRENNAN's approval of applying the in-state service rule in the present case rests on the presence of *all* the factors he lists, and on the absence of any others, every different case will present a different litigable issue. Thus, despite the fact that he manages to work the word "rule" into his formulation, JUSTICE BRENNAN's approach does not establish a rule of law at all, but only a "totality of the circumstances" test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence. It may be that those evils, necessarily accompanying a freestanding "reasonableness" inquiry, must be accepted at the margins, when we evaluate *non*traditional forms of jurisdiction newly adopted by the States, see, *e. g.*, *Asahi Metal Industry Co.* v. *Superior Court of California, Solano County*, 480 U. S. 102, 115 (1987). But that is no reason for injecting them into the core of our American practice, exposing to such a "reasonableness" inquiry the ground of jurisdiction that has hith-

erto been considered the very *baseline* of reasonableness, physical presence.

The difference between us and JUSTICE BRENNAN has nothing to do with whether "further progress [is] to be made" in the "evolution of our legal system." *Post*, at 631, n. 3. It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court. Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the "traditional notions of fairness" that this Court applies may change. But the States have overwhelmingly declined to adopt such limitation or abandonment, evidently not considering it to be progress.[5] The question is whether, armed with no authority other than individual Justices' perceptions of fairness that conflict with both past and current practice, this Court can compel the States to make such a change on the ground that "due process" requries it. We hold that it cannot.

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[5] I find quite unacceptable as a basis for this Court's decisions JUSTICE BRENNAN's view that "the *raison d'être* of various constitutional doctrines designed to protect out-of-staters, such as the Art. IV Privileges and Immunities Clause and the Commerce Clause," *post*, at 640, n. 14, entitles this Court to brand as "unfair," and hence unconstitutional, the refusal of all 50 States "to limit or abandon bases of jurisdiction that have become obsolete," *post*, at 639, n. 14. "Due process" (which is the constitutional text at issue here) does not mean that process which shifting majorities of this Court feel to be "due"; but that process which American society—self-interested American society, which expresses its judgments in the laws of self-interested States—has traditionally considered "due." The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious.

Because the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process, the judgment is

Affirmed.

JUSTICE WHITE, concurring in part and concurring in the judgment.

I join Parts I, II–A, II–B, and II–C of JUSTICE SCALIA's opinion and concur in the judgment of affirmance. The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment. Although the Court has the authority under the Amendment to examine even traditionally accepted procedures and declare them invalid, *e. g.*, *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case. Furthermore, until such a showing is made, which would be difficult indeed, claims in individual cases that the rule would operate unfairly as applied to the particular nonresident involved need not be entertained. At least this would be the case where presence in the forum State is intentional, which would almost always be the fact. Otherwise, there would be endless, fact-specific litigation in the trial and appellate courts, including this one. Here, personal service in California, without more, is enough, and I agree that the judgment should be affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, concurring in the judgment.

I agree with JUSTICE SCALIA that the Due Process Clause of the Fourteenth Amendment generally permits a state

court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State.[1] I do not perceive the need, however, to decide that a jurisdictional rule that "'has been immemorially the actual law of the land,'" *ante*, at 619, quoting *Hurtado* v. *California*, 110 U. S. 516, 528 (1884), automatically comports with due process simply by virtue of its "pedigree." Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional. Unlike JUSTICE SCALIA, I would undertake an "independent inquiry into the . . . fairness of the prevailing in-state service rule." *Ante*, at 621. I therefore concur only in the judgment.

I

I believe that the approach adopted by JUSTICE SCALIA's opinion today—reliance solely on historical pedigree—is foreclosed by our decisions in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977). In *International Shoe*, we held that a state court's assertion of personal jurisdiction does not violate the Due Process Clause if it is consistent with "'traditional notions of fair play and substantial justice.'" 326 U. S., at 316, quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).[2] In *Shaffer*, we stated that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433

[1] I use the term "transient jurisdiction" to refer to jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State.

[2] Our reference in *International Shoe* to "'traditional notions of fair play and substantial justice,'" 326 U. S., at 316, meant simply that those concepts are indeed traditional ones, not that, as JUSTICE SCALIA's opinion suggests, see *ante*, at 621, 622, their specific *content* was to be determined by tradition alone. We recognized that contemporary societal norms must play a role in our analysis. See, *e. g.*, 326 U. S., at 317 (considerations of "reasonable[ness], in the context of our federal system of government").

U. S., at 212 (emphasis added). The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. No longer were we content to limit our jurisdictional analysis to pronouncements that "[t]he foundation of jurisdiction is physical power," *McDonald* v. *Mabee*, 243 U. S. 90, 91 (1917), and that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer* v. *Neff*, 95 U. S. 714, 722 (1878). While acknowledging that "history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfie[d] the demands of due process," we found that this factor could not be "decisive." 433 U. S., at 211–212. We recognized that "'[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Id.*, at 212 (citations omitted). I agree with this approach and continue to believe that "the minimum-contacts analysis developed in *International Shoe* . . . represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer* v. *Neff*." *Id.*, at 219 (BRENNAN, J., concurring in part and dissenting in part) (citation omitted).

While our *holding* in *Shaffer* may have been limited to *quasi in rem* jurisdiction, our mode of analysis was not. Indeed, that we were willing in *Shaffer* to examine anew the appropriateness of the *quasi in rem* rule—until that time dutifully accepted by American courts for at least a century—demonstrates that we did not believe that the "pedigree" of a jurisdictional practice was dispositive in deciding whether it was consistent with due process. We later characterized *Shaffer* as "abandon[ing] the outworn rule of *Harris* v. *Balk*, 198 U. S. 215 (1905), that the interest of a creditor in a debt

could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 296 (1980); see also *Rush* v. *Savchuk*, 444 U. S. 320, 325–326 (1980). If we could discard an "ancient form without substantial modern justification" in *Shaffer*, *supra*, at 212, we can do so again.[3] Lower courts,[4] commentators,[5] and the American Law In-

[3] Even JUSTICE SCALIA's opinion concedes that *sometimes* courts may discard "traditional" rules when they no longer comport with contemporary notions of due process. For example, although, beginning with the Romans, judicial tribunals for over a millenium permitted jurisdiction to be acquired by force, see L. Wenger, Institutes of the Roman Law of Civil Procedure 46–47 (O. Fisk trans., rev. ed. 1986), by the 19th century, as JUSTICE SCALIA acknowledges, this method had largely disappeared. See *ante*, at 613. I do not see why JUSTICE SCALIA's opinion assumes that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago.

[4] Some lower courts have concluded that transient jurisdiction did not survive *Shaffer*. See *Nehemiah* v. *Athletics Congress of U. S. A.*, 765 F. 2d 42, 46–47 (CA3 1985); *Schreiber* v. *Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1088–1091 (Kan. 1978), rev'd on other grounds, 611 F. 2d 790 (CA10 1979); *Harold M. Pitman Co.* v. *Typecraft Software Ltd.*, 626 F. Supp. 305, 310–314 (ND Ill. 1986); *Bershaw* v. *Sarbacher*, 40 Wash. App. 653, 657, 700 P. 2d 347, 349 (1985). Others have held that transient jurisdiction is alive and well. See *ante*, at 615–616. But even cases falling into the latter category have engaged in the type of due process analysis that JUSTICE SCALIA's opinion claims is unnecessary today. See, *e. g.*, *Amusement Equipment, Inc.* v. *Mordelt*, 779 F. 2d 264, 270 (CA5 1985); *Hutto* v. *Plagens*, 254 Ga. 512, 513, 330 S. E. 2d 341, 342 (1985); *In re Marriage of Pridemore*, 146 Ill. App. 3d 990, 992, 497 N. E. 2d 818, 819–820 (1986); *Oxmans' Erwin Meat Co.* v. *Blacketer*, 86 Wis. 2d 683, 688–692, 273 N. W. 2d 285, 287–290 (1979); *Lockert* v. *Breedlove*, 321 N. C. 66, 71–72, 361 S. E. 2d 581, 585 (1987); *Nutri-West* v. *Gibson*, 764 P. 2d 693, 695–696 (Wyo. 1988); *Cariaga* v. *Eighth Judicial District Court*, 104 Nev. 544, 547, 762 P. 2d 886, 888 (1988); *El-Maksoud* v. *El-Maksoud*, 237 N. J. Super. 483, 489, 568 A. 2d 140, 143 (1989); *Carr* v. *Carr*, 180 W. Va. 12, 14, and n. 5, 375 S. E. 2d 190, 192, and n. 5 (1988).

[5] Although commentators have disagreed over whether the rule of transient jurisdiction is consistent with modern conceptions of due process, that they have engaged in such a debate at all shows that they have rejected the methodology employed by JUSTICE SCALIA's opinion today. See

stitute[6] all have interpreted *International Shoe* and *Shaffer* to mean that *every* assertion of state-court jurisdiction, even one pursuant to a "traditional" rule such as transient jurisdiction, must comport with contemporary notions of due process. Notwithstanding the nimble gymnastics of JUS-

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Bernstine, *Shaffer* v. *Heitner:* A Death Warrant for the Transient Rule of In Personam Jurisdiction?, 25 Vill. L. Rev. 38, 47–68 (1979–1980); Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 748–755 (1988); Fyr, Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction, 26 Emory L. J. 739, 770–773 (1977); Lacy, Personal Jurisdiction and Service of Summons After *Shaffer* v. *Heitner*, 57 Ore. L. Rev. 505, 510 (1978); Posnak, A Uniform Approach to Judicial Jurisdiction After *Worldwide* and the Abolition of the "Gotcha" Theory, 30 Emory L. J. 729, 735, n. 30 (1981); Redish, Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation, 75 Nw. U. L. Rev. 1112, 1117, n. 35 (1981); Sedler, Judicial Jurisdiction and Choice of Law: The Consequences of *Shaffer* v. *Heitner*, 63 Iowa L. Rev. 1031, 1035 (1978); Silberman, *Shaffer* v. *Heitner:* The End of an Era, 53 N. Y. U. L. Rev. 33, 75 (1978); Vernon, Single Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of *Shaffer* v. *Heitner*, 1978 Wash. U. L. Q. 273, 303; Von Mehren, Adjudicatory Jurisdiction: General Theories Compared and Evaluated, 63 B. U. L. Rev. 279, 300–307 (1983); Zammit, Reflections on *Shaffer* v. *Heitner*, 5 Hastings Const. L. Q. 15, 24 (1978).

[6] See Restatement (Second) of Conflict of Laws § 24, Comment *b*, p. 29 (Draft of Proposed Revisions, Apr. 15, 1986) ("One basic principle underlies all rules of jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it. With respect to judicial jurisdiction, this principle was laid down by the Supreme Court of the United States in International Shoe . . . ."); *id.*, at 30 ("Three factors are primarily responsible for existing rules of judicial jurisdiction. Present-day notions of fair play and substantial justice constitute the first factor"); *id.*, § 28, Comment *b*, at 41, ("The Supreme Court held in Shaffer v. Heitner that the presence of a thing in a state gives that state jurisdiction to determine interests in the thing only in situations where the exercise of such jurisdiction would be reasonable. . . . It must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory"); Restatement (Second) of Judgments § 8, Comment *a*, p. 64 (Tent. Draft No. 5, Mar. 10, 1978) (*Shaffer* establishes "'minimum contacts' in place of presence as the principal basis for territorial jurisdiction").

TICE SCALIA's opinion today, it is not faithful to our decision in *Shaffer*.

II

Tradition, though alone not dispositive, is of course *relevant* to the question whether the rule of transient jurisdiction is consistent with due process.[7] Tradition is salient not in the sense that practices of the past are automatically reasonable today; indeed, under such a standard, the legitimacy of transient jurisdiction would be called into question because the rule's historical "pedigree" is a matter of intense debate. The rule was a stranger to the common law[8] and was rather

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[7] I do not propose that the "contemporary notions of due process" to be applied are no more than "each Justice's subjective assessment of what is fair and just." *Ante*, at 623. Rather, the inquiry is guided by our decisions beginning with *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and the specific factors that we have developed to ascertain whether a jurisdictional rule comports with "traditional notions of fair play and substantial justice." See, *e. g.*, *Asahi Metal Industry Co.* v. *Superior Court of California, Solano County*, 480 U. S. 102, 113 (1987) (noting "several factors," including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief"). This analysis may not be "mechanical or quantitative," *International Shoe*, *supra*, at 319, but neither is it "freestanding," *ante*, at 626, or dependent on personal whim. Our experience with this approach demonstrates that it is well within our competence to employ.

[8] As JUSTICE SCALIA's opinion acknowledges, American courts in the 19th century erected the theory of transient jurisdiction largely upon Justice Story's historical interpretation of Roman and continental sources. JUSTICE SCALIA's opinion concedes that the rule's tradition "was not as clear as Story thought," *ante*, at 611; in fact, it now appears that as a historical matter Story was almost surely wrong. See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289, 293–303 (1956); Hazard, A General Theory of State-Court Jurisdiction, 1965 S. Ct. Rev. 241, 261 ("Story's system reflected neither decided authority nor critical analysis"). Undeniably, Story's views are in considerable tension with English common law—a "tradition" closer to our own and thus, I would imagine, one that in JUSTICE SCALIA's eyes is more deserving of our study than civil law practice. See R. Boote, An Historical Treatise of an Action or Suit at Law 97 (3d ed. 1805); G. Cheshire, Private International Law 601 (4th ed. 1952); J. West-

weakly implanted in American jurisprudence "at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted." *Ante*, at 611. For much of the 19th century, American courts did not uniformly recognize the concept of transient jurisdiction,[9] and it appears that the

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lake, Private International Law 101–102 (1859); Note, British Precedents for Due Process Limitations on In Personam Jurisdiction, 48 Colum. L. Rev. 605, 610–611 (1948) ("The [British] cases evidence a judicial intent to limit the rules to those instances where their application is consonant with the demands of 'fair play' and 'substantial justice' ").

It seems that Justice Story's interpretation of historical practice amounts to little more than what Justice Story himself perceived to be "fair and just." See *ante*, at 611 (quoting Justice Story's statement that " '[w]here a party is within a territory, he may *justly* be subjected to its process' ") (emphasis added and citation omitted). I see no reason to bind ourselves forever to that perception.

[9] In *Molony* v. *Dows*, 8 Abb. Pr. 316 (N. Y. Common Pleas 1859), for example, the court dismissed an action for a tort that had occurred in California, even though the defendant was served with process while he was in the forum State of New York. The court rejected the plaintiff's contention that it possessed "jurisdiction of all actions, local and transitory, where the defendant resides, or is personally served with process," *id.*, at 325, with the comment that "an action cannot be maintained in this court, or in any court of this State, to recover a pecuniary satisfaction in damages for a wilful injury to the person, inflicted in another State, where, at the time of the act, both the wrongdoer and the party injured were domiciled in that State as resident citizens." *Id.*, at 326. The court reasoned that it could not "undertake to redress every wrong that may have happened in any part of the world, [merely] because the parties, plaintiff or defendant, may afterwards happen to be within [the court's] jurisdiction." *Id.*, at 327–328. Similarly, the Pennsylvania Supreme Court declared it "the *most important* principle of *all* municipal law of Anglo-Saxon origin, that a man shall only be liable to be called upon to answer for civil wrongs in the forum of his home, and the tribunal of his vicinage." *Coleman's Appeal*, 75 Pa. 441, 458 (1874) (emphasis added). And in *Gardner* v. *Thomas*, 14 Johns. *134 (N. Y. 1817), the court was faced with the question "whether this Court will take cognizance of a tort committed on the high seas, on board of a foreign vessel, both the parties being subjects or citizens of the country to which the vessel belongs," after the ship had docked in New York and suit was commenced there. The court observed that Lord Mansfield had appeared "to doubt whether an action may be maintained in *England* for an

transient rule did not receive wide currency until well after our decision in *Pennoyer* v. *Neff*, 95 U. S. 714 (1878).[10]

Rather, I find the historical background relevant because, however murky the jurisprudential origins of transient juris-

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injury in consequence of two persons fighting in *France*, [even] when both are within the jurisdiction of the Court." *Id.*, at *137. The court distinguished the instant case as an action "for an injury on the high seas"—a location, "of course, without the actual or exclusive territory of any nation." *Ibid.* Nevertheless, the court found that while "our Courts may take cognizance of torts committed on the high seas, on board of a foreign vessel where both parties are foreigners, . . . it must, on principles of policy, often rest in the sound discretion of the Court to afford jurisdiction or not, according to the circumstances of the case." *Id.*, at *137–*138. In the particular case before it, the court found jurisdiction lacking. See *id.*, at *138. See also 1 J. Wells, Jurisdiction of Courts 76 (1880) (reporting that a state court had argued that "courts have jurisdiction of actions for torts as to property, even where the parties are non-resident, and the torts were committed out of the state, if the defendant is served with process within the state," but also noting that "*Clerke*, J., very vigorously dissented in the case, and, I judge, with good reason").

It is possible to distinguish these cases narrowly on their facts, as JUSTICE SCALIA demonstrates. See *ante*, at 614–615, n. 3. Thus, *Molony* could be characterized as a case about the reluctance of one State to punish assaults occurring in another, *Gardner* as a *forum non conveniens* case, and *Coleman's Appeal* as a case in which there was no in-state service of process. But such an approach would mistake the trees for the forest. The truth is that the transient rule as we now conceive it had no clear counterpart at common law. Just as today there is an interaction among rules governing jurisdiction, *forum non conveniens*, and choice of law, see, *e. g.*, *Ferens* v. *John Deere Co.*, 494 U. S. 516, 530–531 (1990); *Shaffer*, 433 U. S. 186, 224–226 (1977) (BRENNAN, J., concurring in part and dissenting in part); *Hanson* v. *Denckla*, 357 U. S. 235, 256 (1958) (Black, J., dissenting), at common law there was a complex interplay among pleading requirements, venue, and substantive law—an interplay which in large part substituted for a theory of "jurisdiction":

"A theory of territorial jurisdiction would in any event have been premature in England before, say, 1688, or perhaps even 1832. Problems of jurisdiction were the essence of medieval English law and remained significant until the period of Victorian reform. But until after 1800 it would have been impossible, even if it had been thought appropriate, to

[Footnote 10 is on p. 636]

diction, the fact that American courts have announced the rule for perhaps a century (first in dicta, more recently in holdings) provides a defendant voluntarily present in a particular State *today* "clear notice that [he] is subject to suit" in

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disentangle the question of territorial limitations on jurisdiction from those arising out of charter, prerogative, personal privilege, corporate liberty, ancient custom, and the fortuities of rules of pleading, venue, and process. The intricacies of English jurisdictional law of that time resist generalization on any theory except a franchisal one; they seem certainly not reducible to territorial dimension.

"The English precedents on jurisdiction were therefore of little relevance to American problems of the nineteenth century." Hazard, A General Theory of State-Court Jurisdiction, 1965 S. Ct. Rev. 241, 252–253 (footnote omitted).

See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 617 (1988). The salient point is that many American courts followed English precedents and restricted the place where certain actions could be brought, regardless of the defendant's presence or whether he was served there.

[10] One distinguished legal historian has observed that "notwithstanding dogmatic generalizations later sanctioned by the *Restatement* [of Conflict of Laws], appellate courts hardly ever in fact held transient service sufficient as such" and that "although the transient rule has often been mouthed by the courts, it has but rarely been applied." Ehrenzweig, 65 Yale L. J., at 292, 295 (footnote omitted). Many of the cases cited in JUSTICE SCALIA's opinion, see *ante*, at 612–613, involve either announcement of the rule in dictum or situations where factors other than in-state service supported the exercise of jurisdiction. See, *e. g.*, *Alley* v. *Caspari*, 80 Me. 234, 236, 14 A. 12 (1888) (defendant found to be resident of forum); *De Poret* v. *Gusman*, 30 La. Ann., pt. 2, 930, 932 (1878) (cause of action arose in forum); *Savin* v. *Bond*, 57 Md. 228, 233 (1881) (both defendants residents of forum State); *Hart* v. *Granger*, 1 Conn. 154, 154–155 (1814) (suit brought against former resident of forum State based on contract entered into there); *Baisley* v. *Baisley*, 113 Mo. 544, 550, 21 S. W. 29, 30 (1893) (court ruled for plaintiff on grounds of estoppel because defendant had failed to raise timely objection to jurisdiction in a prior suit); *Bowman* v. *Flint*, 37 Tex. Civ. App. 28, 28–29, 82 S. W. 1049, 1049–1050 (1904) (defendant did business within forum State, and cause of action arose there as well). In *Picquet* v. *Swan*, 19 F. Cas. 609 (No. 11,134) (CC Mass. 1828), Justice Story found jurisdiction to be *lacking* over a suit by a French citizen (a resident of Paris) against an American citizen also residing in Paris. See

the forum. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 297. Regardless of whether Justice Story's account of the rule's genesis is mythical, our common understanding *now*, fortified by a century of judicial practice, is that jurisdiction is often a function of geography. The transient rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process. "If I visit another State, . . . I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks." *Shaffer*, 433 U. S., at 218 (STEVENS, J., concurring in judgment); see also *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476 (1985) ("[T]erritorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there"); Glen, An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction, 45 Brooklyn L. Rev. 607, 611–612 (1979). Thus, proposed revisions to the Restatement (Second) of Conflict of Laws § 28, p. 39 (1986), provide that "[a] state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."[11]

By visiting the forum State, a transient defendant actually "avail[s]" himself, *Burger King*, *supra*, at 476, of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and water-

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also Hazard, *supra*, at 261 (criticizing Story's reasoning in *Picquet* as "at variance" with both American and English decisions).

[11] As the Restatement suggests, there may be cases in which a defendant's involuntary or unknowing presence in a State does not support the exercise of personal jurisdiction over him. The facts of the instant case do not require us to determine the outer limits of the transient jurisdiction rule.

ways; he likely enjoys the fruits of the State's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts.[12] See *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274, 281, n. 10 (1985); *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 387 (1978); see also *Supreme Court of Virginia* v. *Friedman*, 487 U. S. 59, 64–65 (1988). Subject only to the doctrine of *forum non conveniens*, an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens. Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant. See Maltz, Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction, 66 Wash. U. L. Q. 671, 698–699 (1988).

The potential burdens on a transient defendant are slight. "'[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself'" in a State outside his place of residence. *Burger King*, *supra*, at 474, quoting *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 223 (1957). That the defendant has already jour-

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[12] That these privileges may independently be required by the Constitution does not mean that they must be ignored for purposes of determining the fairness of the transient jurisdiction rule. For example, in the context of specific jurisdiction, we consider whether a defendant "has availed himself of the privilege of conducting business" in the forum State, *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476 (1985), or has "'invok[ed] the benefits and protections of its laws,'" *id.*, at 475, quoting *Hanson* v. *Denckla*, 357 U. S., at 253, even though the State could not deny the defendant the right to do so. See also *Asahi Metal Industry Co.* v. *Superior Court of California, Solano County*, 480 U. S., at 108–109 (plurality opinion); *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 781 (1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980).

neyed at least once before to the forum—as evidenced by the fact that he was served with process there—is an indication that suit in the forum likely would not be prohibitively inconvenient. Finally, any burdens that do arise can be ameliorated by a variety of procedural devices.[13] For these reasons, as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process.[14] See n. 11, *supra*.

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[13] For example, in the federal system, a transient defendant can avoid protracted litigation of a spurious suit through a motion to dismiss for failure to state a claim or through a motion for summary judgment. Fed. Rules Civ. Proc. 12(b)(6) and 56. He can use relatively inexpensive methods of discovery, such as oral deposition by telephone (Rule 30(b)(7)), deposition upon written questions (Rule 31), interrogatories (Rule 33), and requests for admission (Rule 36), while enjoying protection from harassment (Rule 26(c)), and possibly obtaining costs and attorney's fees for some of the work involved (Rules 37(a)(4), (b)–(d)). Moreover, a change of venue may be possible. 28 U. S. C. § 1404. In state court, many of the same procedural protections are available, as is the doctrine of *forum non conveniens*, under which the suit may be dismissed. See generally Abrams, Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts, 58 Ind. L. J. 1, 23–25 (1982).

[14] JUSTICE SCALIA's opinion maintains that, viewing transient jurisdiction as a contractual bargain, the rule is "unconscionabl[e]," *ante*, at 623, according to contemporary conceptions of fairness. But the opinion simultaneously insists that because of its historical "pedigree," the rule is "the very *baseline* of reasonableness." *Ante*, at 627. Thus is revealed JUSTICE SCALIA's belief that tradition *alone* is completely dispositive and that no showing of unfairness can ever serve to invalidate a traditional jurisdictional practice. I disagree both with this belief and with JUSTICE SCALIA's assessment of the fairness of the transient jurisdiction bargain.

I note, moreover, that the dual conclusions of JUSTICE SCALIA's opinion create a singularly unattractive result. JUSTICE SCALIA suggests that when and if a jurisdictional rule becomes substantively unfair or even "unconscionable," this Court is powerless to alter it. Instead, he is willing to rely on individual States to limit or abandon bases of jurisdiction that have become obsolete. See *ante*, at 627, and n. 5. This reliance is misplaced, for States have little incentive to limit rules such as transient jurisdiction that make it *easier* for their own citizens to sue out-of-state defendants. That States are more likely to expand their jurisdiction is illustrated by the

In this case, it is undisputed that petitioner was served with process while voluntarily and knowingly in the State of California. I therefore concur in the judgment.

JUSTICE STEVENS, concurring in the judgment.

As I explained in my separate writing, I did not join the Court's opinion in *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), because I was concerned by its unnecessarily broad reach. *Id.*, at 217–219 (opinion concurring in judgment). The same concern prevents me from joining either JUSTICE SCALIA's or JUSTICE BRENNAN's opinion in this case. For me, it is sufficient to note that the historical evidence and consensus identified by JUSTICE SCALIA, the considerations of fairness identified by JUSTICE BRENNAN, and the common sense displayed by JUSTICE WHITE, all combine to demonstrate that this is, indeed, a very easy case.* Accordingly, I agree that the judgment should be affirmed.

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adoption by many States of long-arm statutes extending the reach of personal jurisdiction to the limits established by the Federal Constitution. See 2 J. Moore, J. Lucas, H. Fink, & C. Thompson, Moore's Federal Practice ¶ 4.41–1[4], p. 4–336 (2d ed. 1989); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1068, pp. 336–339 (1987). Out-of-staters do not vote in state elections or have a voice in state government. We should not assume, therefore, that States will be motivated by "notions of fairness" to curb jurisdictional rules like the one at issue here. The reasoning of JUSTICE SCALIA's opinion today is strikingly oblivious to the *raison d'être* of various constitutional doctrines designed to protect out-of-staters, such as the Art. IV Privileges and Immunities Clause and the Commerce Clause.

*Perhaps the adage about hard cases making bad law should be revised to cover easy cases.

FORT STEWART SCHOOLS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89–65. Argued January 10, 1990—Decided May 29, 1990

During collective bargaining, petitioner schools, which are owned and operated by the Army at a military facility, declined to negotiate with respondent Fort Stewart Association of Educators (Union) over proposals relating to a salary increase and fringe benefits. Respondent Federal Labor Relations Authority held that the Federal Service Labor-Management Relations Statute (FSLMRS or Statute) required petitioner to bargain over the proposals. The Court of Appeals affirmed.

Held: The Authority did not err in ruling that petitioner was required to bargain over the Union's proposals. Pp. 644–657.

(a) The Authority's conclusion that the Union's proposals related to "conditions of employment" within the meaning of the Statute, over which covered employers are required to bargain, is based upon a permissible construction and is entitled to deference absent an unambiguous expression of congressional intent to the contrary. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843. The Statute defines "conditions of employment" as matters "affecting working conditions," but excludes matters (1) relating to prohibited partisan political activities; (2) relating to the classification of positions; or (3) specifically provided for by federal statute. Although, in isolation, the term "working conditions" might be read to connote only the physical conditions under which an employee labors, the structure of the statutory definition tends to negate that meaning, which would render the first two exceptions unnecessary. There is no merit to petitioner's contention that, although the term "conditions of employment" may generally include any matter insisted upon as a prerequisite to accepting employment, it does not include wages. Wages are the quintessential prerequisite to accepting employment. Nor is the inclusion in the National Labor Relations Act and the Postal Reorganization Act of specific references to "wages" relevant here; those statutes deal with labor-management relations in entirely different spheres, and nothing in the FSLMRS indicates that it is to be read *in pari materia* with them. Statements in the legislative history suggesting that the FSLMRS duty to bargain does not extend to wage and fringe-benefit proposals are also irrelevant, in light of indications that these statements were based on

the erroneous belief that the wages and benefits of all Executive Branch employees are fixed by law and are therefore eliminated from the "conditions of employment" definition by the third statutory exception. Pp. 644–650.

(b) The Union's proposals are not exempted from the statutory duty to bargain by an FSLMRS provision specifying that "nothing in this chapter shall affect the authority of any [agency] management official . . . to determine the [agency's] budget." Under the Authority's precedents interpreting this provision, petitioner had the burden of proving that the Union's proposals would result in significant and unavoidable increases in petitioner's costs. Since petitioner placed nothing in the record to document its total costs or even its current total teachers' salaries, the Authority reasonably determined that it could not conclude from an increase in one budget item of indeterminate amount whether petitioner's costs as a whole would be significantly and unavoidably increased. Pp. 650–653.

(c) Title 20 U. S. C. § 241—which directs agencies establishing schools on federally owned property to limit expenditures to "an amount per pupil which will not exceed the per pupil cost of free public education provided [by] comparable communities in the State"—and an implementing Army regulation—which requires that federal school salary schedules equal those in the private sector—do not relieve petitioner of its duty to bargain on the ground that the Union's proposed salary increase would require petitioner to pay its teachers more than employees in local civilian school systems. In rejecting this argument, the Authority relied on an FSLMRS provision requiring, "to the extent not inconsistent with Federal law," bargaining over the subject of an agency regulation "if the Authority has determined . . . that no compelling need . . . exists for the . . . regulation," and on its own implementing regulation declaring that a "compelling need" exists if, among other things, the agency regulation in question implements a statutory mandate that is "essentially nondiscretionary in nature." It cannot be said that the salary equality requirement is "essentially nondiscretionary in nature," since § 241 mandates equivalence only in total per pupil expenditure, not in each separate element of educational cost. Pp. 653–657.

860 F. 2d 396, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court. MARSHALL, J., filed a concurring opinion, *post*, at p. 657.

Christopher J. Wright argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Rob-*

erts, Assistant Attorney General Gerson, Deputy Solicitor General Shapiro, William Kanter, and *Jacob M. Lewis.*

William E. Persina argued the cause for respondents. With him on the brief for respondent Federal Labor Relations Authority was *Jill A. Griffin.* *Richard J. Hirn* and *Ronald R. Austin* filed a brief for respondent Fort Stewart Association of Educators.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case we review the decision of the Federal Labor Relations Authority that petitioner Fort Stewart Schools, a Federal Government employer, is required to bargain with the labor union representing its employees over a proposal relating to wages and fringe benefits.

I

Respondent Fort Stewart Association of Educators (Union), is the collective-bargaining representative of the employees of two elementary schools at Fort Stewart, a United States military facility in Georgia. The schools, petitioner here, are owned and operated by the United States Army under authority of 64 Stat. 1107, 20 U. S. C. § 241(a), which directs the Secretary of Health and Human Services to "make such arrangements . . . as may be necessary to provide free public education" for children living on federally owned property. The present controversy arose when, during the course of collective-bargaining negotiations, the Union submitted to the schools proposals relating to mileage reimbursement, various types of paid leave, and a salary increase. Petitioner declined to negotiate these matters, claiming that they were not subject to bargaining under Title VII of the Civil Service Reform Act of 1978, sometimes re-

*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Jeremiah A. Collins, Laurence Gold, Mark D. Roth, Kevin M. Grile,* and *Lawrence A. Poltrock;* and for the National Treasury Employees Union by *Gregory O'Duden* and *Kerry L. Adams.*

ferred to as the Federal Service Labor-Management Relations Statute, 5 U. S. C. § 7101 *et seq.* (FSLMRS or Statute). The Union sought the aid of the Federal Labor Relations Authority pursuant to §§ 7105(a)(2)(D) and (E) and the Authority held that the Union's proposals were negotiable. *Fort Stewart Assn. of Educators*, 28 F. L. R. A. 547 (1987). Upon a petition for review by petitioner and cross-petitions for enforcement by the Authority and the Union, the Court of Appeals for the Eleventh Circuit upheld the Authority's decision, 860 F. 2d 396 (1988), and we granted certiorari, 493 U. S. 807 (1989).

II

The FSLMRS requires a federal agency to negotiate in good faith with the chosen representative of employees covered by the Statute, 5 U. S. C. § 7114(a)(4), and makes it an unfair labor practice to refuse to do so, § 7116(a)(5). The scope of the negotiating obligation is set forth in § 7102, which confers upon covered employees the right, through their chosen representative, "to engage in collective bargaining with respect to conditions of employment." § 7102(2). Section 7103(a)(14) defines "conditions of employment" as follows:

> "'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> "(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> "(B) relating to the classification of any position; or
>
> "(C) to the extent such matters are specifically provided for by Federal statute . . . ."

In construing these provisions, and the other provisions of the FSLMRS at issue in this case, the Authority was interpreting the statute that it is charged with implementing, see

§ 7105. We must therefore review its conclusions under the standard set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). If, upon examination of "the particular statutory language at issue, as well as the language and design of the statute as a whole," *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988), it is clear that the Authority's interpretation is incorrect, then we need look no further, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U. S., at 842–843. If, on the other hand, "the statute is silent or ambiguous" on the point at issue, we must decide "whether the agency's answer is based on a permissible construction of the statute." *Ibid.*

The Authority concluded that the Union's proposals related to "conditions of employment," following its decision in *American Federation of Government Employees, AFL–CIO, Local 1897*, 24 F. L. R. A. 377, 379 (1986) *(AFGE)*. 28 F. L. R. A., at 550–551. Petitioner claims that this was error because § 7103(a)(14) defines "conditions of employment" as matters affecting "working conditions," and because the latter term most naturally connotes "the physical conditions under which an employee labors," Brief for Petitioner 17. The difficulty here, of course, is that the word "conditions" has two common meanings. It can mean matters "established or agreed upon as a requisite to the doing . . . of something else"; and it can also mean "attendant circumstances," or an "existing state of affairs." Webster's Third New International Dictionary 473 (1961). Whereas the term "conditions of employment" in § 7102 seems to us equally susceptible of both meanings, petitioner is correct that the term "working conditions" in the defining provision of § 7103(a)(14) more naturally refers, in isolation, only to the "circumstances" or "state of affairs" attendant to one's performance of a job. See *Department of Defense Dependents Schools* v. *FLRA*, 274 U. S. App. D. C. 299, 301, 863 F. 2d 988, 990 (1988) ("The term 'working conditions' ordinarily calls to

mind the day-to-day circumstances under which an employee performs his or her job"), rehearing en banc granted, No. 87–1733 (Feb. 6, 1989). Even if, however, it could not reasonably be interpreted to bear the other meaning in isolation, here it is not in isolation, but forms part of a paragraph whose structure, as a whole, lends support to the Authority's broader reading.

As set forth above, § 7103(a)(14) specifically excepts from the definition of "conditions of employment" (and thus suggests *are covered* by the term "working conditions") "policies, practices, and matters . . . relating to political activities prohibited under subchapter III of chapter 73 of this title." The subchapter referred to contains restrictions on partisan political activities of federal employees and protects them from being required or coerced to engage in political activity. It is barely conceivable, but most unlikely, that this provision of § 7103(a)(14) was meant to exclude from collective-bargaining proposals that would somehow infect with politics the "physical conditions" of the workplace; it seems much more plausibly directed at "conditions of employment" in the sense of qualifications demanded of, or obligations imposed upon, employees. And the second exception set forth in § 7103(a)(14), as set forth above, *unquestionably* assumes that "conditions of employment" (and hence "working conditions") bears this broader meaning. The exception of "policies, practices, and matters . . . relating to the classification of any position" would be utterly unnecessary if petitioner's interpretation of "working conditions" were correct.

It might reasonably be argued, of course, that these two exceptions are indeed technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin *(ex abundanti cautela)*. But petitioner does not make this argument. Indeed, in its reply brief petitioner claims that it is "a serious distortion of [its] position," Reply Brief for Petitioner 2, to characterize it, as respondent Union does, as asserting

that "negotiations over 'working conditions' are limited to the physical conditions under which an employee labors." Brief for Respondent Union 11. Petitioner asserts that, to the contrary, it "recognize[s] that the phrase 'conditions of employment' is no doubt susceptible of diverse interpretations," including an interpretation whereby it would embrace "any subject which is insisted upon as a prerequisite for continued employment," Reply Brief for Petitioner 2 (internal quotations omitted); and petitioner even acknowledges, with apparent approval, that the phrase in the present statute "has been extended beyond the purely physical conditions of the workplace," *ibid.* The textual argument is thus abandoned. Petitioner seeks to persuade us, not (as respondent Union does) that the term "conditions of employment" (as defined to include only "working conditions") bears one, rather than the other, of its two possible meanings; but rather to persuade us that it bears some third meaning no one has ever conceived of, so that it includes *other* insisted-upon prerequisites for continued employment, but does not include the insisted-upon prerequisite *par excellence*, wages. And this new unheard-of meaning, petitioner contends, is so "unambiguously expressed," *Chevron*, *supra*, at 843, that we must impose it upon the agency initially responsible for interpreting the statute, despite the deference otherwise accorded under *Chevron*. To describe this position is sufficient to reject it, but we nonetheless examine briefly the elements petitioner sets forth to establish that "conditions of employment" clearly has a meaning here that it bears nowhere else.

Petitioner points to the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, which authorizes bargaining over "wages, hours, and other terms and conditions of employment," § 158(d), and to the Postal Reorganization Act, 39 U. S. C. § 1201 *et seq.*, which grants postal workers the right to bargain over "wages, hours, and working conditions." Note following § 1201. Because each of these statutes specifically refers to wages, the argument

runs, we must infer from the absence of such a reference in the FSLMRS that Congress did not mean to include them. But those other statutes deal with labor-management relations in entirely different fields of employment, and the FSLMRS contains no indication that it is to be read *in pari materia* with them. The first of those provisions does (perhaps) show that the term "conditions of employment" can be used to refer only to physical circumstances of employment; and the second of them does (perhaps) show that "working conditions" is more naturally used to mean that—but those are points we have already conceded.

Petitioner discusses at great length the legislative history of the Statute, from which it has culled a formidable number of statements suggesting that certain members and committees of Congress did not think the duty to bargain would extend to proposals relating to wages and fringe benefits. A Senate Report, for example, states unequivocally that "[t]he bill permits unions to bargain collectively on personnel policies and practices, and other matters affecting working conditions within the authority of agency managers. . . . It excludes bargaining on economic matters . . . ." S. Rep. No. 95–969, pp. 12–13 (1978). A House Report recounts that the bill "does not permit . . . bargaining on wages and fringe benefits . . . ." H. R. Rep. No. 95–1403, p. 12 (1978). To like effect are numerous floor statements by both sponsors and opponents.[1]

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[1] See 124 Cong. Rec. 25716, 29182 (1978) (remarks of Rep. Udall) ("We do not permit bargaining over pay and fringe benefits, but on other issues relating to an employee's livelihood") ("There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement"); *id.*, at 24286, 25720 (remarks of Rep. Clay) ("[E]mployees still . . . cannot bargain over pay") ("I . . . want to assure my colleagues that there is nothing in this bill which allows Federal employees the right . . . to negotiate over pay and money-related fringe benefits"); *id.*, at 27549 (remarks of Sen. Sasser) ("[E]xclusive representatives of Federal employees may not bargain over pay or fringe benefits").

The trouble with these statements, to the extent they are relevant to our inquiry, is that they may have been wrong. The wages and fringe benefits of the overwhelming majority of Executive Branch employees are fixed by law, in accordance with the General Schedules of the Civil Service Act, see 5 U. S. C. § 5332, and are therefore eliminated from the definition of "conditions of employment" by the third exception in § 7103(a)(14) set forth above—which excludes "matters . . . specifically provided for by Federal statute." 5 U. S. C. § 7103(a)(14)(C). Employees of schools established under § 241 are among a miniscule minority of federal employees whose wages are exempted from operation of the General Schedules. Title 20 U. S. C. § 241(a) provides that an agency establishing such a school may fix "the compensation, tenure, leave, hours of work, and other incidents of the employment relationship" of its employees "without regard to the Civil Service Act and rules." *Ibid.* See also *AFGE*, 24 F. L. R. A., at 378. The legislative materials to which petitioner refers display no awareness of this exception. To the contrary, numerous statements, many from the same sources to which petitioner points, display the erroneous belief that the wages and fringe benefits of *all* Executive Branch employees were set by statute. See H. R. Rep. No. 95–1403, p. 12 (1978) ("Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress"); *id.*, at 44 ("Rates of overtime pay are not bargainable, because they are specifically provided for by statute").[2] Thus, all of the statements to which petitioner

[2] Statements from the floor are to like effect. See *id.*, at 25721, 25722 (remarks of Rep. Ford) ("[N]o matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by a negotiated agreement") ("It is not the intent of this provision to interfere with the current system of providing the employees in question with retirement benefits, life insurance benefits, health insurance benefits, and workmen's compensation. Those benefits would not become negotiable and would continue to be paid to those employees exclusively pursuant

refers may have rested upon the following syllogism: The wages and fringe benefits of all federal employees are specifically provided for by federal statute; "conditions of employment" subject to the duty to bargain do not include "matters . . . specifically provided for by Federal statute"; therefore "conditions of employment" subject to the duty to bargain do not include the wages and fringe benefits of all federal employees. Since the premise of that syllogism is wrong, so may be its expressed conclusion. There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate. Cf. *Yellow Freight System, Inc.* v. *Donnelly*, 494 U. S. 820, 824 (1990) (expectation by Members of Congress that all Title VII suits would be tried in federal court, "even if universally shared," does not establish that the statute requires such suits to be brought in federal court).

III

Petitioner next argues that, even if the Union's proposals relate to "conditions of employment" subject to bargaining under § 7102, they are exempted from the statutory duty to bargain by § 7106, which provides that "nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . budget . . . of the agency . . . ." 5 U. S. C. § 7106. The Authority rejected that claim by applying the test established in its decision in *American Federation of Government Employees, AFL–CIO*, 2 F. L. R. A. 604 (1980), enf'd on other grounds *sub nom.*

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to the Federal statutes in effect"); *id.*, at 29182 (remarks of Sen. Udall) ("All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action"); *id.*, at 29174 (remarks of Rep. Collins) (criticizing the bill as too broad because it excluded from the scope of bargaining only "matter[s] relating to discrimination, political activities, and those few specifically prescribed by law—for example, pay and benefits").

Department of Defense v. *FLRA*, 212 U. S. App. D. C. 256, 659 F. 2d 1140 (1981), cert. denied, 455 U. S. 945 (1982):

> "To establish that a proposal directly interferes with an agency's right to determine its budget under section 7106(a)(1) of the Statute, an agency must make a substantial showing that the proposal requires the inclusion of a particular program or amount in its budget *or that the proposal will result in significant and unavoidable increases in cost not affected* [sic: *offset*] *by compensating benefits.*" 28 F. L. R. A., at 551 (emphasis added).

Because petitioner did not contend that the Union's proposal required "the inclusion of a particular program or amount in its budget," the only question for the Authority was whether petitioner had made out its case under the underscored standard. The Authority held that it had not, finding that petitioner had shown neither that its costs would be significantly and unavoidably increased were it to accept the proposals offered by the Union, nor that "any increased costs . . . would not be offset by compensating benefits." *Id.*, at 552.

The parties initially dispute which entity is the relevant "agency" for purposes of determining whether the Union's proposals would "affect the authority of any management official of any agency . . . to determine the . . . budget . . . of the agency . . . ." 5 U. S. C. § 7106(a). The Authority concluded only that petitioner had not satisfied § 7106(a) with respect to its own budget, *i. e.*, that of the schools at the Fort Stewart Army base. The Court of Appeals upheld the Authority's decision, but did so by reference to the budget of the Army as a whole, which it noted "includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." 860 F. 2d, at 405–406. We cannot, however, uphold the Authority's decision on that basis, for it is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are

entitled to deference, it must be upheld on the rationale set forth by the agency itself. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 93–95 (1943). Because petitioner does not challenge, as a ground for reversing the Authority's decision, its determination to look only to petitioner's budget, we assume without deciding that that determination was correct.

Petitioner does not take issue with the Authority's premise that § 7106 does not make a proposal nonnegotiable simply because it "imposes a cost upon the agency which requires the expenditure of appropriated agency funds." See 28 F. L. R. A., at 607. Rather, petitioner argues that "the application of the FLRA's rule here—particularly the conclusion that the proposal calling for a 13.5% pay raise would not significantly affect the agency's budget—is plainly flawed." Brief for Petitioner 28. Petitioner also claims that "the other aspect of the FLRA's rule—requiring management to show that a significant increase in costs would not be offset by compensating benefits—is not reasonable or consistent with the statute, because it negates management's right to set the agency budget." *Ibid.*

The latter observation has some force if the Authority's definition of "compensating benefits" is as petitioner describes it. Petitioner claims that, in order to prove that the cost of a given proposal is not outweighed by "compensating benefits," an agency must disprove not only monetary benefits, but also nonmonetary "intangible" benefits such as the positive effects that a proposed change might have on employee morale. Although counsel for the Authority agreed with petitioner's statement of its test at oral argument before this Court, it is not entirely clear from the Authority's cases that the "benefits" side of the calculus is as all embracing as petitioner suggests. Cf. *International Association of Fire Fighters Local F-61*, 3 F. L. R. A. 438, 452 (1980) (rejecting agency's claim of no "compensating benefits" where "the agency has made no substantial demonstration that the increased costs . . . will not be offset by increased employee

performance, reduced turnover, fewer grievances and the like"). Indeed, it is difficult to see how the Authority could possibly derive a test measured by nonmonetary benefits from a provision that speaks only to the agency's "authority . . . to determine . . . [its] budget," a phrase that can only be understood to refer to the allocation of funds within the agency.

We need not dwell on this point, however, because the Authority's first ground for its decision is supported by substantial evidence. Petitioner has challenged neither the Authority's requirement that an agency show a significant and unavoidable increase in its costs, nor the Authority's finding that petitioner failed to submit any evidence on that point in this case. Rather, it asks us to hold that a proposal calling for a 13.5% salary increase would necessarily result in a "significant and unavoidable" increase in the agency's overall costs. We cannot do that without knowing even so rudimentary a fact as the percentage of the agency's budget attributable to teachers' salaries. Under the Authority's precedents, petitioner had the burden of proof on this point, but it placed nothing in the record to document its total costs or even its current total teachers' salaries. The Authority reasonably determined that it could not conclude from an increase in one budget item of indeterminate amount whether petitioner's costs as a whole would be "significant[ly] and unavoidabl[y]" increased.[3]

IV

Petitioner's final argument rests upon 20 U. S. C. § 241, which directs the agency establishing a school thereunder to "ensure that the education provided pursuant to such arrangement is comparable to free public education provided

[3] Because petitioner loses under the standard set out in the second part of the Authority's test, and because neither party challenges that standard, we need not reach the question discussed in JUSTICE MARSHALL's opinion, viz., whether the Authority's interpretation of the phrase "to determine the . . . budget" in § 7106 is too generous to the Government.

for children in comparable communities in the State," § 241 (a), and to limit expenditures "[t]o the maximum extent practicable" to "an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State," § 241(e). In implementing this provision, the Army has promulgated a regulation stating that education provided under § 241 "will be considered comparable to free public education offered by selected communities of the State" when 10 specified factors, including "[s]alary schedules" are, "to the maximum extent practicable, equal." Army Reg. 352–3, 1–7(h) (1980). Petitioner claims—and we assume for purposes of this discussion—that in order to accept the Union's proposals, it would have to contravene this regulation because the proposed salaries would exceed those of employees of the local school systems.

It is a familiar rule of administrative law that an agency must abide by its own regulations. *Vitarelli* v. *Seaton*, 359 U. S. 535, 547 (1959); *Service* v. *Dulles*, 354 U. S. 363, 388 (1957). That says nothing, however, about whether an agency can be compelled to negotiate about a change in its regulations. The latter question is addressed by 5 U. S. C. § 7117(a)(2), which provides, insofar as applicable to the regulation here, that "[t]he duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . *only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.*" (Emphasis added.) Section 7117(b) sets out the procedures by which the Authority is to make its "compelling need" determination, see generally *FLRA* v. *Aberdeen Proving Ground, Department of Army*, 485 U. S. 409 (1988), and § 7105(a)(2)(D) instructs the Authority to "prescribe criteria" for that determination.

Pursuant to this last provision, the Authority has adopted the following regulation:

> "A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets any one or more of the following illustrative criteria:
>
> "(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency . . . in a manner which is consistent with the requirements of an effective and efficient government.
>
> "(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.
>
> "(c) The rule or regulation implements a mandate to the agency . . . under law or other outside authority, which implementation is essentially nondiscretionary in nature." 5 CFR § 2424.11 (1989).

Before the Authority, petitioner rested its entire case upon the assertion that the last of these criteria was satisfied by the provision of Army Regulation 352–3 which requires salaries equal to those of local schools, since that provision "implements the mandate" of § 241(a). The Authority disagreed, following its decision in *Fort Knox Teachers Assn.*, 27 F. L. R. A. 203, 215, 216 (1987), which said that no "compelling need" for Army Regulation 352–3 exists because § 241 does not require the agency "to match exactly the conditions of employment of teachers in local school districts" or "to restrict the Agency's discretion as to the particular employment practices which could be adopted."

Petitioner argues that, although "[s]ection 241 does not specifically provide that teachers' salaries . . . must be set by comparison with those at local public schools," Brief for Petitioner 32, it does state that "[f]or the purpose of providing such comparable education," teachers' salaries and benefits "may be fixed without regard to the [General Schedules set out in the] Civil Service Act," 20 U. S. C. § 241(a). Accord-

ing to petitioner, "it is a fair reading of [§ 241] to conclude that Congress excepted [wages and fringe benefits] from the civil service laws so that they would be set by comparison with those at public schools." Brief for Petitioner 33. That is not so. All that can reasonably be deduced from the exclusion of the General Schedules is that Congress expected teachers' wages and benefits to be one of the elements that the federal agency could adjust in order to render per pupil expenditure comparable to that in local public schools. But to be able to adjust is not to be required to make equal. The statute requires equivalence ("[t]o the maximum extent practicable") in total per pupil expenditure, not in each separate element of educational cost. An agency may well decide to pay teachers more or less than teachers in local schools, in order that it may expend less or more than local schools for other needs of the educational program. It is thus impossible to say that the requirement of Army Reg. 352–3 that teachers' salaries be "to the maximum extent practicable, equal" was "essentially nondiscretionary in nature" within the meaning of § 2424.11(c).

Petitioner insists, however, that reading § 2424.11 this strictly renders that regulation in violation of the Statute, which never requires bargaining over any matter covered by a regulation except "to the extent not inconsistent with Federal law." See § 7117(a)(2); see also § 7117(a)(1). Thus, to recognize a compelling need for a regulation "only if it implements a statutory mandate that leaves an agency absolutely no room for discretion," Brief for Petitioner 33, n. 23, is to render the "compelling need" exception of § 7117(a)(2) a nullity, for bargaining over such a regulation would be "inconsistent with Federal law" anyway. We may assume, without deciding, that petitioner is correct that any rule that meets the § 2424.11(c) "essentially nondiscretionary" standard as interpreted by the Authority would necessarily be a rule required by law. There is some support for that equivalency in the Authority's cases. See, *e. g.*, *Fort Knox*

Teachers Assn., 25 F. L. R. A. 1119 (1987). But see *National Border Patrol Council, American Federation of Government Employees, AFL–CIO*, 23 F. L. R. A. 106 (1986); *National Federation of Federal Employees, Local 1153*, 26 F. L. R. A. 505 (1987). Even so, the Authority's regulation does not eliminate the "compelling need" exception. Petitioner's argument ignores the existence of subsections (a) and (b) of § 2424.11, which provide alternative methods of proving "compelling need." In this case, to be sure, petitioner chose not to assert a claim that Army Regulation 352–3 was either "essential . . . to the accomplishment of the mission or the execution of functions of the agency," 5 CFR § 2424.11(a) (1989), or "necessary to insure the maintenance of basic merit principles," § 2424.11(b). But, those alternatives were available and suffice to give the regulation for which there is a "compelling need" an existence quite independent of the regulation whose elimination would be inconsistent with law.

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit is

Affirmed.

JUSTICE MARSHALL, concurring.

I write separately to emphasize that management's prerogative to "determine . . . the . . . budget . . . of the agency," 5 U. S. C. § 7106(a)(1), is reasonably, and perhaps necessarily, subject to a narrower reading than the one adopted by the Federal Labor Relations Authority. The Authority presently interprets that prerogative as exempting from the duty to bargain proposals that either (1) require the inclusion of a particular program or operation in the agency's budget or prescribe the amount to be allocated to them in the budget, or (2) result in significant and unavoidable increases in costs not offset by compensating benefits. *American Federation of Govt. Employees, AFL–CIO (AFGE)*, 2 F. L. R. A. 604, 608 (1980), enf'd on other grounds *sub nom. Department of Defense* v. *FLRA*, 212 U. S. App. D. C. 256, 659 F. 2d 1140 (1981). Section 7106(a)(1) is more naturally read, however,

as withdrawing from mandatory bargaining only those proposals addressed to the budget *per se*, not those that would result in significantly increased expenditures by the agency.

As the Authority stated in formulating its test, "'budget' means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them." *AFGE*, *supra*, at 608 (citing Webster's Third New International Dictionary (1966)). To "determine the budget," then, means to calculate in advance the funds available to the agency and the allocation of those funds among the agency's programs and operations. See *AFGE*, *supra*, at 608. The language of the statute thus exempts from the duty to bargain only those proposals that would involve the union in the budget process itself. This interpretation also accords more closely with Congress' intent that the management prerogatives in § 7106 be construed narrowly. See, *e. g.*, 124 Cong. Rec. 29183 (1978) (statement by Rep. Udall, author of the language in § 7106) (§ 7106 is "to be treated narrowly as an exception to the general obligation to bargain over conditions of employment"); *id.*, at 29187 (statement of Rep. Clay) ("[I]t is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations"); H. R. Rep. No. 95–1403, p. 44 (1978) ("The committee intends that section 7106 . . . be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal").

The first part of the Authority's test accords with the plain meaning of the budget provision. The second part, however, is at best a stretch of the statutory language. Proposals that impose "significant" and "unavoidable" costs on the agency do not interfere with the agency's prerogative to determine which programs and operations to include in its budget and how to allocate funds among them. Such proposals may of course affect budgetary decisions, but to remove

them from bargaining would eliminate bargaining over many important matters altogether, without any indication that Congress intended to do so.

The Union's proposals in this case would clearly not fall within the agency's budget prerogative because they do not require union involvement in the budget process. Because the Union's proposals are negotiable even under the agency's "significant cost" test, we need not decide whether that test is inconsistent with the statute. The Court's opinion, however, does not foreclose a future challenge to that test.

CITIBANK, N. A. *v.* WELLS FARGO ASIA LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–1260. Argued March 19, 1990—Decided May 29, 1990

Respondent Wells Fargo Asia Limited (WFAL), a Singapore-chartered bank wholly owned by a United States-chartered bank, agreed to make two time deposits in Eurodollars—*i. e.*, United States dollars that have been deposited with a banking institution located outside the country, with a corresponding obligation on the part of that institution to repay the deposits in United States dollars—with Citibank/Manila, a branch of petitioner Citibank, N. A. (Citibank), which is chartered in the United States. The parties received telexes detailing the deposits' terms from the money broker who had arranged them. The parties also exchanged slips confirming the deposits and stating that repayment was to occur in New York. Citibank/Manila refused to repay the deposits when they matured because a Philippine government decree prevented it from repaying them with its Philippine assets. WFAL commenced suit in the District Court, claiming that Citibank in New York was liable for the funds deposited with Citibank/Manila. Finding that there was a distinction between "repayment," which refers to the physical location for transacting discharge of the debt, and "collection," which refers to the location where assets may be taken to satisfy the debt, the court determined that the parties' confirmation slips established an agreement to repay the deposits in New York, but that there was neither an express agreement nor one that could be implied from custom or usage in the Eurodollar market on the issue of where the deposits could be collected; that no provision of Philippine law barred an agreement making WFAL's deposits collectible outside Manila; that, in the absence of such an agreement, New York law, rather than Philippine law, applied and required that Citibank be found liable for WFAL's deposits with Citibank/Manila; and that WFAL could look to Citibank's worldwide assets for satisfaction of its deposits. The Court of Appeals affirmed on different grounds. It concluded that the District Court's finding that the parties had agreed to repay WFAL's deposits in New York was not clearly erroneous under Federal Rule of Civil Procedure 52(a) and reasoned that, under general banking law principles, if parties agree that repayment of a foreign bank deposit may occur at another location, they authorize demand and collection of the deposit at that location. Thus, it held that

WFAL was entitled to collect its deposits out of Citibank's New York assets.

Held:

1. The Court of Appeals' factual premise that the parties agreed to permit collection from Citibank's New York assets contradicts the District Court's factual determinations, which are not clearly erroneous. Pp. 668–672.

(a) The District Court distinguished an agreement on "repayment" from one respecting "collection" and, in quite specific terms, found that the only agreement the parties made referred to repayment. However, while saying that this finding was not clearly erroneous, the Court of Appeals appears to have viewed repayment and collection as interchangeable concepts, not divisible ones. In responding to an argument that a bank's home office should not bear the risk of foreign restrictions on the payment of assets from the foreign branch where a deposit has been placed, unless it has an express agreement to do so, the Court of Appeals stated that its affirmance of the District Court's order was based on just such an agreement. Furthermore, to support its holding, the court relied on authorities that all turned upon the existence, or nonexistence, of an agreement for collection. Pp. 668–670.

(b) The District Court's findings—that the parties agreed on repayment, but not collection—were not clearly erroneous. While the confirmation slips are explicit that repayment would take place in New York, they do not indicate an agreement that WFAL could collect its deposits from Citibank's New York assets. In fact, their language seems to negate such an agreement's existence. The money broker's telexes also speak in terms of repayment and do not indicate any agreement about where WFAL could collect its deposits if Citibank/Manilla failed to remit repayment. Moreover, a fair reading of the contradictory testimony at trial supports the conclusion that the parties failed to establish a relevant custom or practice in the international banking community from which it could be inferred that they had a tacit understanding on this point. Pp. 670–672.

2. The case is remanded for the Court of Appeals to determine whether, in the absence of an agreement, collection is permitted by rights and duties implied by law. On remand, the court must determine which law applies and the content of that law. It is not a fair or necessary construction of the Court of Appeals' opinion to say that it relies on state law. Alternatively, if the Court of Appeals is of the view that the controlling rule is supplied by Philippine law or by the federal common-law rule respecting bank deposits, it should make that determination, subject to further review deemed appropriate by this Court. Thus, it is premature to consider the parties' other contentions respecting

the necessity for any rule of federal common law or the pre-emptive effect of federal statutes and regulations on bank deposits and reserves. Pp. 672–674.

852 F. 2d 657, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 674. STEVENS, J., filed a dissenting opinion., *post*, p. 674.

Robert H. Bork argued the cause for petitioner. With him on the briefs were *Arnold M. Lerman*, *David Westin*, *Kenneth S. Geller*, and *Mark I. Levy*.

Deputy Solicitor General Merrill argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Jeffrey P. Minear*, *Abraham D. Sofaer*, *J. Virgil Mattingly*, and *Robert B. Serino*.

Darryl Snider argued the cause for respondent. With him on the brief were *George A. Cumming, Jr.*, *Thomas M. Peterson*, and *Edwin E. McAmis*.*

JUSTICE KENNEDY delivered the opinion of the Court.

At issue here is whether the home office of a United States bank is obligated to use its general assets to repay a Eurodollar deposit made at one of its foreign branches, after the foreign country's government has prohibited the branch from making repayment out of its own assets.

I

The case arises from a transaction in what is known in the banking and financial communities as the Eurodollar market. As the District Court defined the term, Eurodollars are

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**John L. Warden*, *Michael M. Wiseman*, *Michael S. Straus*, and *Norman R. Nelson* filed a brief for the New York Clearing House Association et al. as *amici curiae* urging reversal.

Dennis G. Lyons filed a brief for the Bank of Montreal et al. as *amici curiae* urging affirmance.

United States dollars that have been deposited with a banking institution located outside the United States, with a corresponding obligation on the part of the banking institution to repay the deposit in United States dollars. See App. to Pet. for Cert. 42a; P. Oppenheim, International Banking 243 (5th ed. 1987). The banking institution receiving the deposit can be either a foreign branch of a United States bank or a foreign bank.

A major component of the Eurodollar market is interbank trading. In a typical interbank transaction in the Eurodollar market, the depositing bank (Bank A) agrees by telephone or telex, or through a broker, to place a deposit denominated in United States dollars with a second bank (Bank X). For the deposit to be a Eurodollar deposit, Bank X must be either a foreign branch of a United States bank or a foreign bank; Bank A, however, can be any bank, including one located in the United States. To complete the transactions, most banks that participate in the interbank trading market utilize correspondent banks in New York City, with whom they maintain, directly or indirectly, accounts denominated in United States dollars. In this example, the depositor bank, Bank A, orders its correspondent bank in New York (Bank B) to transfer United States dollars from Bank A's account to Bank X's account with Bank X's New York correspondent bank (Bank Y). The transfer of funds from Bank B to Bank Y is accomplished by means of a wire transfer through a clearing mechanism located in New York City and known as the Clearing House Interbank Payments System, or "CHIPS." See Scanlon, Definitions and Mechanics of Eurodollar Transactions, in The Eurodollar 16, 24–25 (H. Prochnow ed. 1970); Brief for New York Clearing House Association et al. as *Amici Curiae* 4. Repayment of the funds at the end of the deposit term is accomplished by having Bank Y transfer funds from Bank X's account to Bank B, through the CHIPS system, for credit to Bank A's account.

The transaction at issue here follows this pattern. Respondent Wells Fargo Asia Limited (WFAL) is a Singapore-chartered bank wholly owned by Wells Fargo Bank, N. A., a bank chartered by the United States. Petitioner Citibank, N. A. (Citibank), also a United States-chartered bank, operates a branch office in Manila, Philippines (Citibank/Manila). On June 10, 1983, WFAL agreed to make two $1 million time deposits with Citibank/Manila. The rate at which the deposits would earn interest was set at 10%, and the parties agreed that the deposits would be repaid on December 9 and 10, 1983. The deposits were arranged by oral agreement through the assistance of an Asian money broker, which made a written report to the parties that stated, *inter alia:*

> "'Pay: Citibank, N. A. New York Account Manila
>
> "'Repay: Wells Fargo International, New York Account Wells Fargo Asia Ltd., Singapore Account #003–023645.'" 852 F. 2d 657, 658–659 (CA2 1988).

The broker also sent WFAL a telex containing the following "'[i]nstructions'":

> "'Settlement—Citibank NA NYC AC Manila
>
> "'Repayment—Wells Fargo Bk Intl NYC Ac Wells Fargo Asia Ltd Sgp No 003–023645.'" *Id.*, at 659.

That same day, the parties exchanged telexes confirming each of the two deposits. WFAL's telexes to Citibank/Manila read:

> "'We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.'" *Ibid.*

The telexes from Citibank/Manila to WFAL read:

> "'Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.'" *Ibid.*

A few months after the deposit was made, the Philippine government issued a Memorandum to Authorized Agent Banks (MAAB 47) which provided in relevant part:

> "'Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.'" *Ibid.*

According to the Court of Appeals, "[a]s interpreted by the Central Bank of the Philippines, this decree prevented Citibank/Manila, an 'authorized agent bank' under Philippine law, from repaying the WFAL deposits with its Philippine assets, *i. e.*, those assets not either deposited in banks elsewhere or invested in non-Philippine enterprises." *Ibid.* As a result, Citibank/Manila refused to repay WFAL's deposits when they matured in December 1983.

WFAL commenced the present action against Citibank in the United States District Court for the Southern District of New York, claiming that Citibank in New York was liable for the funds that WFAL deposited with Citibank/Manila. While the lawsuit was pending, Citibank obtained permission from the Central Bank of the Philippines to repay its Manila depositors to the extent that it could do so with the non-Philippine assets of the Manila branch. It paid WFAL $934,000; the remainder of the deposits, $1,066,000, remains in dispute. During the course of this litigation, Citibank/Manila, with the apparent consent of the Philippine government, has continued to pay WFAL interest on the outstanding principal. See App. to Pet. for Cert. 48a.

After a bench trial on the merits, the District Court accepted WFAL's invitation to assume that Philippine law governs the action. The court saw the issue to be whether, under Philippine law, a depositor with Citibank/Manila may look to assets booked at Citibank's non-Philippine offices for

repayment of the deposits. After considering affidavits from the parties, it concluded (1) that under Philippine law an obligation incurred by a branch is an obligation of the bank as a whole; (2) that repayment of WFAL's deposits with assets booked at Citibank offices other than Citibank/Manila would not contravene MAAB 47; and (3) that Citibank therefore was obligated to repay WFAL, even if it could do so only from assets not booked at Citibank/Manila. *Id.*, at 31a-35a. It entered judgment for WFAL, and Citibank appealed.

A panel of the United States Court of Appeals for the Second Circuit remanded the case to the District Court to clarify the basis for its judgment. The Second Circuit ordered the District Court to make supplemental findings of fact and conclusions of law on the following matters:

> "(a) Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.
>
> "(b) If there was an agreement, what were its essential terms?
>
> "(c) Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.
>
> "(d) If there is no controlling Philippine law referred to in (c) above, what law does control?" *Id.*, at 26a.

In response to the first query, the District Court distinguished the concepts of repayment and collection, defining repayment as "refer[ring] to the location where the wire transfers effectuating repayment at maturity were to occur," and collection as "refer[ring] to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment." *Id.*, at 14a. It concluded that the parties' confirmation slips established an agreement that repayment was to occur in New York, and that there was neither an express agreement nor one that

could be implied from custom or usage in the Eurodollar market on the issue of where the deposits could be collected. In response to the second question, the court stated that "[t]he only agreement relating to collection or repayment was that repayment would occur in New York." *Id.*, at 18a. As to third query, the court stated that it knew of no provision of Philippine law that barred an agreement making WFAL's deposits collectible outside Manila. Finally, in response to the last query, the District Court restated the issue in the case as follows:

> "Hence, the dispute in this case . . . boils down to one question: is Citibank obligated to use its worldwide assets to satisfy plaintiff's deposits? In other words, the dispute is not so much about where repayment physically was to be made or where the deposits were collectible, but rather which assets Citibank is required to use in order to satisfy its obligation to plaintiff. As we have previously found that the contract was silent on this issue, we interpret query (d) as imposing upon us the task . . . of deciding whether New York or Philippine law controls the answer to that question." *Id.*, at 19a.

The District Court held that, under either New York or federal choice-of-law rules, New York law should be applied. After reviewing New York law, it held that Citibank was liable for WFAL's deposits with Citibank/Manila, and that WFAL could look to Citibank's worldwide assets for satisfaction of its deposits.

The Second Circuit affirmed, but on different grounds. Citing general banking law principles, the Court of Appeals reasoned that, in the ordinary course, a party who makes a deposit with a foreign branch of a bank can demand repayment of the deposit only at that branch. In the court's view, however, these same principles established that this "normal limitation" could be altered by an agreement between the bank and the depositor: "If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another

location, they authorize demand and collection at that other location." 852 F. 2d, at 660. The court noted that the District Court had found that Citibank had agreed to repay WFAL's deposits in New York. It concluded that the District Court's finding was not clearly erroneous under Federal Rule of Civil Procedure 52(a), and held that, as a result, WFAL was entitled "to collect the deposits out of Citibank assets in New York." 852 F. 2d., at 661.

We granted certiorari. 493 U. S. 990 (1989). We decide that the factual premise on which the Second Circuit relied in deciding the case contradicts the factual determinations made by the District Court, determinations that are not clearly erroneous. We vacate the judgment and remand the case to the Court of Appeals for further consideration of the additional legal questions in the case.

II

Little need be said respecting the operation or effect of the Philippine decree at this stage of the case, for no party questions the conclusion reached by both the District Court and the Court of Appeals that Philippine law does not bar the collection of WFAL's deposits from the general assets of Citibank in the State of New York. See 852 F. 2d, at 660–661; App. to Pet. for Cert. 18a. The question, rather, is whether Citibank is obligated to allow collection in New York, and on this point two principal theories must be examined. The first is that there was an agreement between the parties to permit collection in New York, or indeed at any place where Citibank has assets, an agreement implied from all the facts in the case as being within the contemplation of the parties. A second, and alternative, theory for permitting collection is that, assuming no such agreement, there is a duty to pay in New York in any event, a duty that the law creates when the parties have not contracted otherwise. See 3 A. Corbin, Contracts § 561, pp. 276–277 (1960).

The Court of Appeals appears to have relied upon the first theory we have noted, adopting the premise that the parties did contract to permit recovery from the general assets of Citibank in New York. Yet the District Court had made it clear that there is a distinction between an agreement on "repayment," which refers to the physical location for transacting discharge of the debt, and an agreement respecting "collection," which refers to the location where assets may be taken to satisfy it, and in quite specific terms, it found that the only agreement the parties made referred to repayment.

The Court of Appeals, while it said that this finding was not clearly erroneous, appears to have viewed repayment and collection as interchangeable concepts, not divisible ones. It concluded that the agreement as to where repayment could occur constituted also an agreement as to which bank assets the depositor could look to for collection. The strongest indication that the Court of Appeals was interpreting the District Court's findings in this manner is its answer to the argument, made by the United States as *amicus curiae*, that the home office of a bank should not bear the risk of foreign restrictions on the payment of assets from the foreign branch where a deposit has been placed, unless it makes an express agreement to do so. The court announced that "[o]ur affirmance in the present case is based on *the district court's finding of just such an agreement.*" 852 F. 2d, at 661 (emphasis added).

That the Court of Appeals based its ruling on the premise of an agreement between the parties is apparent as well from the authorities upon which it relied to support its holding. The court cited three cases for the proposition that an agreement to repay at a particular location authorizes the depositor to collect the deposits at that location, all of which involve applications of the act of state doctrine: *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F. 2d 516 (CA2), cert. dism'd, 473 U. S. 934 (1985); *Garcia* v. *Chase Manhattan Bank, N. A.*, 735 F. 2d 645, 650–651 (CA2 1984);

and *Braka* v. *Bancomer, S. N. C.*, 762 F. 2d 222, 225 (CA2 1985). Each of these three cases turns upon the existence, or nonexistence, of an agreement for collection. In *Garcia* and *Allied Bank*, the agreement of the parties to permit collection at a location outside of the foreign country made the legal action of the foreign country irrelevant. See *Garcia*, 735 F. 2d, at 646 (agreement between the parties was that "Chase's main office in New York would guarantee the certificate [of deposit] and that [the depositors] could be repaid by presenting the certificate at any Chase branch worldwide"); *id.*, at 650 (purpose of the agreement was "to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs"); *Allied Bank*, *supra*, at 522 (agreement between the parties was that Costa Rican banks' obligation to repay various loans in New York "would not be excused in the event that Central Bank [of Costa Rica] failed to provide the necessary United States dollars for payment"). In *Braka*, the agreement between the parties was that repayment and collection would be permitted only in the foreign country, and so the foreign law controlled. See 762 F. 2d, at 224–225 (specifically distinguishing *Garcia* on the ground that the bank had not guaranteed repayment of the deposits outside of Mexico). By its reliance upon these cases, the Court of Appeals, it seems to us, must have been relying upon the existence of an agreement between Citibank and WFAL to permit collection in New York. As noted above, however, this premise contradicts the express finding of the District Court.

Under Federal Rule of Civil Procedure 52(a), the Court of Appeals is permitted to reject the District Court's findings only if those findings are clearly erroneous. As the Court of Appeals itself acknowledged, the record contains ample support for the District Court's finding that the parties agreed that repayment, defined as the wire transfers effecting the transfer of funds to WFAL when its deposits matured, would

take place in New York. The confirmation slips exchanged by the parties are explicit: The transfer of funds upon maturity was to occur through wire transfers made by the parties' correspondent banks in New York. See *supra*, at 664.

As to collection, the District Court found that neither the parties' confirmation slips nor the evidence offered at trial with regard to whether "an agreement concerning the place of collection could be implied from custom and usage in the international banking field" established an agreement respecting collection. See App. to Pet. for Cert. 16a-17a. Upon review of the record, we hold this finding, that no such implied agreement existed based on the intent of the parties, was not clearly erroneous. The confirmation slips do not indicate an agreement that WFAL could collect its deposits from Citibank assets in New York; indeed, Citibank/Manila's confirmation slip, stating that "[a]t maturity *we* remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY *through Citibank New York*," see *supra*, at 664 (emphasis added), tends to negate the existence of any such agreement. The telexes from the money broker who arranged the deposits speak in terms of repayment, and indicate no more than that repayment was to be made to WFAL's account with its correspondent bank in New York; they do not indicate any agreement about where WFAL could collect its deposits in the event that Citibank/Manila failed to remit payment upon maturity to this account.

Nor does the evidence contradict the District Court's conclusion that the parties, in this particular case, failed to establish a relevant custom or practice in the international banking community from which it could be inferred that the parties had a tacit understanding on the point. Citibank's experts testified that the common understanding in the banking community was that the higher interest rates offered for Eurodollar deposits, in contrast to dollar deposits with United States banks, reflected in part the fact that the deposits were not subject to reserve and insurance requirements

imposed on domestic deposits by United States banking law. This could only be the case, argues Citibank, if the deposits were "payable only" outside of the United States, as required by 38 Stat. 270, as amended, 12 U. S. C. § 461(b)(6), and 64 Stat. 873, as amended, 12 U. S. C. § 1813(l)(5). It argues further that higher rates reflected the depositor's assumption of foreign "sovereign risk," defined as the risk that actions by the foreign government having legal control over the foreign branch and its assets would render the branch unable to repay the deposit. See, *e. g.*, App. 354–367 (testimony of Ian H. Giddy).

WFAL's experts, on the other hand, testified that the identical interest rates being offered for Eurodollar deposits in both Manila and London at the time the deposits were made, despite the conceded differences in sovereign risk between the two locations, reflected an understanding that the home office of a bank was liable for repayment in the event that its foreign branch was unable to repay for any reason, including restrictions imposed by a foreign government. See, *e. g.*, *id.*, at 270–272 (testimony of Gunter Dufey).

A fair reading of all of the testimony supports the conclusion that, at least in this trial, on the issue of the allocation of sovereign risk there was a wide variance of opinion in the international banking community. We cannot say that we are left with "the definite and firm conviction" that the District Court's findings are erroneous. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). Because the Court of Appeals' holding relies upon contrary factual assumptions, the judgment for WFAL cannot be affirmed under the reasoning used by that court.

Given the finding of the District Court that there was no agreement between the parties respecting collection from Citibank's general assets in New York, the question becomes whether collection is permitted nonetheless by rights and duties implied by law. As is its right, see *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, and n. 6 (1970), WFAL seeks

to defend the judgment below on the ground that, under principles of either New York or Philippine law, Citibank was obligated to make its general assets available for collection of WFAL's deposits. See Brief for Respondent 18, 23, 30–49. It is unclear from the opinion of the Court of Appeals which law it found to be controlling; and we decide to remand the case for the Court of Appeals to determine which law applies, and the content of that law. See *Thigpen* v. *Roberts*, 468 U. S. 27, 32 (1984); *Dandridge*, *supra*, at 475–476, and n. 6.

One of WFAL's contentions is that the Court of Appeals' opinion can be supported on the theory that it is based upon New York law. We do not think this is a fair or necessary construction of the opinion. The Court of Appeals placed express reliance on its own opinion in *Garcia* v. *Chase Manhattan Bank, N. A.*, 735 F. 2d 645 (CA2 1984), without citing or discussing *Perez* v. *Chase Manhattan Bank, N. A.*, 61 N. Y. 2d 460, 463 N. E. 2d 5 (1984). In that case, the New York Court of Appeals was explicit in pointing out that its decision was in conflict with that reached two days earlier by the Second Circuit in *Garcia*, *supra*, a case that the *Perez* court deemed "similar on its facts." See 61 N. Y. 2d, at 464, n. 3, 463 N. E. 2d, at 9, n. 3. Given this alignment of authorities, we are reluctant to interpret the Court of Appeals' decision as resting on principles of state law. The opinion of the Court of Appeals, moreover, refers to "general banking law principles" and "United States law," 852 F. 2d, at 660; whether this is the semantic or legal equivalent of the law of New York is for the Court of Appeals to say in the first instance.

Alternatively, if the Court of Appeals, based upon its particular expertise in the law of New York and commercial matters generally, is of the view that the controlling rule is supplied by Philippine law or, as Citibank would have it, by a federal common-law rule respecting bank deposits, it should make that determination, subject to any further review we deem appropriate. In view of our remand, we find

it premature to consider the other contentions of the parties respecting the necessity for any rule of federal common law, or the pre-emptive effect of federal statutes and regulations on bank deposits and reserves. See 12 U. S. C. §§ 461(b)(6), 1813(l)(5)(a); 12 CFR § 204.128(c) (1990). All of these matters, of course, may be addressed by the Court of Appeals if necessary for a full and correct resolution of the case.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, concurring.

Upon reading the opinion of the Court in this case, one may fairly inquire as to why certiorari was granted. The opinion decides no novel or undecided question of federal law, but simply recanvasses the same material already canvassed by the Court of Appeals and comes to a different conclusion than that court did. I do not believe that granting plenary review in a case such as this is a wise use of our limited judicial resources. But the Court by its grant of certiorari has decided that the case should be considered on the merits. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 559 (1957) (Harlan, J., dissenting). I join the opinion of the Court.

JUSTICE STEVENS, dissenting.

The Court wisely decides this case on a narrow ground. Its opinion, however, ignores an aspect of the case that is of critical importance for me.

The parties agree that Citibank assumed the risk of loss caused by either the insolvency of its Manila branch, or by an act of God.* Citibank argues that only the so-called "sovereign risk" is excluded from its undertaking to repay the de-

*E. g., Brief for Petitioner 16, n. 26; Brief for Respondent 15, 39–40; Tr. of Oral Arg. 10, 16 (petitioner); *id.*, at 31–32 (United States as *amicus curiae* in support of petitioner).

posit out of its general assets. In my opinion such a specific exclusion from a general undertaking could only be the product of an express agreement between the parties. The District Court's finding that no such specific agreement existed is therefore dispositive for me.

Accordingly, I would affirm the judgment of the Court of Appeals.

DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–6546. Argued November 29, 1989—Decided May 29, 1990

While living on one Indian Tribe's reservation, petitioner Duro, an enrolled member of another Tribe, allegedly shot and killed an Indian youth within the reservation's boundaries. He was charged with the illegal firing of a weapon on the reservation under the tribal criminal code, which is confined to misdemeanors. After the tribal court denied his petition to dismiss the prosecution for lack of jurisdiction, he filed a habeas corpus petition in the Federal District Court. The court granted the writ, holding that assertion of jurisdiction by the Tribe over a nonmember Indian would constitute discrimination based on race in violation of the equal protection guarantees of the Indian Civil Rights Act of 1968, since, under *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, non-Indians are exempt from tribal courts' criminal jurisdiction. The Court of Appeals reversed. It held that the distinction drawn between a Tribe's members and nonmembers throughout *United States* v. *Wheeler*, 435 U. S. 313—which, in upholding tribal criminal jurisdiction over tribe members, stated that tribes do not possess criminal jurisdiction over "nonmembers"—was "indiscriminate" and should be given little weight. Finding the historical record "equivocal," the court held that the applicable federal criminal statutes supported the view that the tribes retain jurisdiction over minor crimes committed by Indians against other Indians without regard to tribal membership. It also rejected Duro's equal protection claim, finding that his significant contacts with the prosecuting Tribe—such as residing with a Tribe member on the reservation and working for the Tribe's construction company—justified the exercise of the Tribe's jurisdiction. Finally, it found that the failure to recognize tribal jurisdiction over Duro would create a jurisdictional void, since the relevant federal criminal statute would not apply to this charge, and since the State had made no attempt, and might lack the authority, to prosecute him.

Held: An Indian tribe may not assert criminal jurisdiction over a nonmember Indian. Pp. 684–698.

(a) The rationale of *Oliphant*, *Wheeler*, and subsequent cases compels the conclusion that Indian tribes lack jurisdiction over nonmembers. Tribes lack the power to enforce laws against all who come within their borders, *Oliphant*, *supra*. They are limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining the sovereignty needed to control their own internal relations and preserve their own unique customs and social order, *Wheeler*, *supra*. Their power to prescribe and enforce rules of conduct for their own members falls outside that part of their sovereignty that they implicitly lost by virtue of their dependent status, but the power to prosecute an outsider would be inconsistent with this status and could only come from a delegation by Congress. The distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law. See, *e. g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U. S. 463; *Montana* v. *United States*, 450 U. S. 544. Although broader retained tribal powers have been recognized in the exercise of civil jurisdiction, such jurisdiction typically involves situations arising from property ownership within the reservation or consensual relationships with the tribe or its members, and criminal jurisdiction involves a more direct intrusion on personal liberties. Since, as a nonmember, Duro cannot vote in tribal elections, hold tribal office, or sit on a tribal jury, his relationship with the Tribe is the same as the non-Indian's in *Oliphant*. Pp. 684–688.

(b) A review of the history of the modern tribal courts and the opinions of the Solicitor of the Department of the Interior on the tribal codes at the time of their enactment also indicates that tribal courts embody only the powers of *internal* self-governance. The fact that the Federal Government treats Indians as a single large class with respect to *federal* programs is not dispositive of a question of *tribal* power to treat them by the same broad classification. Pp. 688–692.

(c) This case must be decided in light of the fact that all Indians are now citizens of the United States. While Congress has special powers to legislate with respect to Indians, Indians like all citizens are entitled to protection from unwarranted intrusions on their personal liberty. This Court's cases suggest constitutional limits even on the ability of Congress to subject citizens to criminal proceedings before a tribunal, such as a tribal court, that does not provide constitutional protections as a matter of right. In contrast, retained jurisdiction over members is accepted by the Court's precedents and justified by the voluntary charac-

ter of tribal membership and the concomitant right of participation in a tribal government. Duro's enrollment in one Tribe says little about his consent to the exercise of authority over him by another Tribe. Tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home, but differ in important aspects of language, culture, and tradition. The rationale of adopting a "contacts" test to determine which nonmember Indians must be subject to tribal jurisdiction would apply to non-Indian residents as well and is little more than a variation of the argument, already rejected for non-Indians, that any person entering the reservation is deemed to have given implied consent to tribal criminal jurisdiction. Pp. 692–696.

(d) This decision does not imply endorsement of a jurisdictional void over minor crime by nonmembers. Congress is the proper body to address the problem if, in fact, the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement. Pp. 696–698.

851 F. 2d 1136, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, which MARSHALL, J., joined, *post*, p. 698.

John Trebon, by appointment of the Court, 490 U. S. 1079, argued the cause and filed briefs for petitioner.

Richard B. Wilks argued the cause for respondents. With him on the brief was *M. J. Mirkin*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Stewart*, *Harriet S. Shapiro*, *Robert L. Klarquist*, *Edward J. Shawaker*, *William G. Lavell*, and *Scott Keep*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Three Affiliated Tribes of the Fort Berthold Reservation et al. by *Charles A. Hobbs;* and for the Sac and Fox Nation et al. by *G. William Rice*.

Briefs of *amici curiae* were filed for the Rosebud Sioux Tribe et al. by *Jerilyn DeCoteau* and *Robert T. Anderson;* and for the Salt River Project Agricultural Improvement and Power District by *John B. Weldon, Jr.*, and *Stephen E. Crofton*.

JUSTICE KENNEDY delivered the opinion of the Court.

We address in this case whether an Indian tribe may assert criminal jurisdiction over a defendant who is an Indian but not a tribal member. We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.

I

The events giving rise to this jurisdictional dispute occurred on the Salt River Indian Reservation. The reservation was authorized by statute in 1859, and established by Executive Order of President Hayes in 1879. It occupies some 49,200 acres just east of Scottsdale, Arizona, below the McDowell Mountains. The reservation is the home of the Salt River Pima-Maricopa Indian Community, a recognized Tribe with an enrolled membership. Petitioner in this case, Albert Duro, is an enrolled member of another Indian Tribe, the Torres-Martinez Band of Cahuilla Mission Indians. Petitioner is not eligible for membership in the Pima-Maricopa Tribe. As a nonmember, he is not entitled to vote in Pima-Maricopa elections, to hold tribal office, or to serve on tribal juries. Salt River Pima–Maricopa Indian Community Code of Ordinances §§ 3–1, 3–2, 5–40, App. 55–59.

Petitioner has lived most of his life in his native State of California, outside any Indian reservation. Between March and June 1984, he resided on the Salt River Reservation with a Pima-Maricopa woman friend. He worked for the PiCopa Construction Company, which is owned by the Tribe.

On June 15, 1984, petitioner allegedly shot and killed a 14-year-old boy within the Salt River Reservation boundaries. The victim was a member of the Gila River Indian Tribe of Arizona, a separate Tribe that occupies a separate reservation. A complaint was filed in United States District Court charging petitioner with murder and aiding and abetting

murder in violation of 18 U. S. C. §§2, 1111, and 1153.[1] Federal agents arrested petitioner in California, but the federal indictment was later dismissed without prejudice on the motion of the United States Attorney.

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[1] Jurisdiction in "Indian country," which is defined in 18 U. S. C. § 1151, see *United States* v. *John*, 437 U. S. 634, 648–649 (1978), is governed by a complex patchwork of federal, state, and tribal law. For enumerated major felonies, such as murder, rape, assault, and robbery, federal jurisdiction over crimes committed by an Indian is provided by 18 U. S. C. § 1153, commonly known as the Indian Major Crimes Act, which, as amended in 1986, states:

"(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive juridiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

It remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction. See *United States* v. *Wheeler*, 435 U. S. 313, 325, n. 22 (1978).

Another federal statute, the Indian Country Crimes Act, 18 U. S. C. § 1152, applies the general laws of the United States to crimes committed in Indian country:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The general law of the United States may assimilate state law in the absence of an applicable federal statute. 18 U. S. C. § 13. Section 1152 also contains the following exemptions:

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the

Petitioner then was placed in the custody of Pima-Maricopa officers, and he was taken to stand trial in the Pima-Maricopa Indian Community Court. The tribal court's powers are regulated by a federal statute, which at that time limited tribal criminal penalties to six months' imprisonment and a $500 fine. 25 U. S. C. § 1302(7) (1982 ed.). The tribal criminal code is therefore confined to misdemeanors.[2] Petitioner was charged with the illegal firing of a weapon on the reservation. After the tribal court denied petitioner's motion to dismiss the prosecution for lack of jurisdiction, he filed a peti-

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local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

For Indian country crimes involving only non-Indians, longstanding precedents of this Court hold that state courts have exclusive jurisdiction despite the terms of § 1152. See *New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); *United States* v. *McBratney*, 104 U. S. 621 (1882). Certain States may also assume jurisdiction over Indian country crime with the consent of the affected tribe pursuant to Pub. L. 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified, as amended, at 18 U. S. C. § 1162, 28 U. S. C. § 1360) and the Indian Civil Rights Act of 1968, Pub. L. 90–284, Tit. IV, 82 Stat. 78 (codified at 25 U. S. C. §§ 1321–1328).

The final source of criminal jurisdiction in Indian country is the retained sovereignty of the tribes themselves. It is undisputed that the tribes retain jurisdiction over their members, subject to the question of exclusive jurisdiction under § 1153 mentioned above. See *United States* v. *Wheeler*, *supra*. The extent of tribal jurisdiction over nonmembers is at issue here. For a scholarly discussion of Indian country jurisdiction, see Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 505 (1976).

[2] Title II of the Indian Civil Rights Act of 1968, 82 Stat. 77, codified at 25 U. S. C. §§ 1301–1303, imposes certain protections and limitations on the exercise of tribal authority. Under a 1986 amendment to the Act, the limit on tribal court criminal punishment is now set at one year's imprisonment and a $5,000 fine. The Act also provides protections similar, though not identical, to those contained in the Bill of Rights, which does not apply to the tribes, see *Talton* v. *Mayes*, 163 U. S. 376 (1896). For information about the Salt River Tribal Court and the courts of other tribes, see National American Indian Court Judges Association, Native American Tribal Court Profiles (1984).

tion for a writ of habeas corpus in the United States District Court for the District of Arizona, naming the tribal chief judge and police chief as respondents.

The District Court granted the writ, holding that assertion of jurisdiction by the Tribe over an Indian who was not a member would violate the equal protection guarantees of the Indian Civil Rights Act of 1968, 25 U. S. C. § 1301 *et seq.* Under this Court's holding in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), tribal courts have no criminal jurisdiction over non-Indians. The District Court reasoned that, in light of this limitation, to subject a nonmember Indian to tribal jurisdiction where non-Indians are exempt would constitute discrimination based on race. The court held that respondents failed to articulate a valid reason for the difference in treatment under either rational-basis or strict-scrutiny standards, noting that nonmember Indians have no greater right to participation in tribal government than non-Indians, and no lesser fear of discrimination in a court system that bars the participation of their peers.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 821 F. 2d 1358 (1987). Both the panel opinion and the dissent were later revised. 851 F. 2d 1136 (1988). The Court of Appeals examined our opinion in *United States* v. *Wheeler*, 435 U. S. 313 (1978), decided 16 days after *Oliphant*, a case involving a member prosecuted by his Tribe in which we stated that tribes do not possess criminal jurisdiction over "nonmembers." The Court of Appeals concluded that the distinction drawn between members and nonmembers of a tribe throughout our *Wheeler* opinion was "indiscriminate," and that the court should give "little weight to these casual references." 851 F. 2d, at 1140–1141. The court also found the historical record "equivocal" on the question of tribal jurisdiction over nonmembers.

The Court of Appeals then examined the federal criminal statutes applicable to Indian country. See 18 U. S. C. §§ 1151–1153. Finding that references to "Indians" in those

statutes and the cases construing them applied to all Indians, without respect to their particular tribal membership, the court concluded that "if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so." The tribes, it held, retain jurisdiction over minor crimes committed by Indians against other Indians "without regard to tribal membership." 851 F. 2d, at 1143.

The Court of Appeals rejected petitioner's equal protection argument under the Indian Civil Rights Act of 1968. It found no racial classification in subjecting petitioner to tribal jurisdiction that could not be asserted over a non-Indian. Instead, it justified tribal jurisdiction over petitioner by his significant contacts with the Pima-Maricopa Community, such as residing with a member of the Tribe on the reservation and his employment with the Tribe's construction company. The need for effective law enforcement on the reservation provided a rational basis for the classification. *Id.*, at 1145.

As a final basis for its result, the panel said that failure to recognize tribal jurisdiction over petitioner would create a "jurisdictional void." To treat petitioner as a non-Indian for jurisdictional purposes would thwart the exercise of federal criminal jurisdiction over the misdemeanor because, as the court saw it, the relevant federal criminal statute would not apply to this case due to an exception for crimes committed "by one Indian against the person or property of another Indian." See 18 U. S. C. § 1152. This would leave the crime subject only to the state authorities, which had made no effort to prosecute petitioner, and might lack the power to do so. 851 F. 2d, at 1145–1146.

Judge Sneed dissented, arguing that this Court's opinions limit the criminal jurisdiction of an Indian tribe to its members, and that Congress has given the Tribe no criminal jurisdiction over nonmembers. He reasoned that the federal criminal statutes need not be construed to create a jurisdic-

tional void, and stressed that recognition of jurisdiction here would place the nonmember Indian, unlike any other citizen, in jeopardy of trial by an alien tribunal. *Id.*, at 1146–1151. These views were reiterated by three other Ninth Circuit judges in a dissent from denial of rehearing en banc. 860 F. 2d 1463 (1988). The dissenters accepted petitioner's contention that tribal jurisdiction subjected him to an impermissible racial classification and to a tribunal with the potential for bias.

Between the first and second sets of opinions from the Ninth Circuit panel, the Eighth Circuit held that tribal courts do not possess inherent criminal jurisdiction over persons not members of the tribe. *Greywater* v. *Joshua*, 846 F. 2d 486 (1988). Due to the timing of the opinions, both the Eighth Circuit and the Ninth Circuit in this case had the benefit of the other's analysis but rejected it. We granted certiorari to resolve the conflict, 490 U. S. 1034 (1989), and now reverse.

II

Our decisions in *Oliphant* and *Wheeler* provide the analytic framework for resolution of this dispute. *Oliphant* established that the inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation. *Wheeler* reaffirmed the longstanding recognition of tribal jurisdiction over crimes committed by tribe members. The case before us is at the intersection of these two precedents, for here the defendant is an Indian, but not a member of the Tribe that asserts jurisdiction. As in *Oliphant*, the tribal officials do not claim jurisdiction under an affirmative congressional authorization or treaty provision, and petitioner does not contend that Congress has legislated to remove jurisdiction from the tribes. The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.

We think the rationale of our decisions in *Oliphant* and *Wheeler*, as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members. Our discussion of tribal sovereignty in *Wheeler* bears most directly on this case. We were consistent in describing retained tribal sovereignty over the defendant in terms of a tribe's power over its *members*. Indeed, our opinion in *Wheeler* stated that the tribes "cannot try nonmembers in tribal courts." 435 U. S., at 326. Literal application of that statement to these facts would bring this case to an end. Yet respondents and *amici*, including the United States, argue forcefully that this statement in *Wheeler* cannot be taken as a statement of the law, for the party before the Court in *Wheeler* was a member of the Tribe.

It is true that *Wheeler* presented no occasion for a holding on the present facts. But the double jeopardy question in *Wheeler* demanded an examination of the nature of retained tribal power. We held that jurisdiction over a Navajo defendant by a Navajo court was part of retained tribal sovereignty, not a delegation of authority from the Federal Government. It followed that a federal prosecution of the same offense after a tribal conviction did not involve two prosecutions by the same sovereign, and therefore did not violate the Double Jeopardy Clause. Our analysis of tribal power was directed to the tribes' status as limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance. We recognized that the "sovereignty that the Indian tribes retain is of a unique and limited character." *Id.*, at 323.

A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in *Wheeler* reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own

unique customs and social order. The power of a tribe to prescribe and enforce rules of conduct for its own members "does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." 435 U. S., at 326. As we further described the distinction:

> "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. . . . [T]hey are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.*

Our finding that the tribal prosecution of the defendant in *Wheeler* was by a sovereign other than the United States rested on the premise that the prosecution was a part of the tribe's *internal* self-governance. Had the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution.

The distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law. Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class. We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U. S. 463 (1976); *McClanahan* v. *Arizona Tax*

Comm'n, 411 U. S. 164 (1973). But this rationale does not apply to taxation of nonmembers, even where they are Indians:

> "Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements." *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 161 (1980).

Similarly, in *Montana* v. *United States*, 450 U. S. 544 (1981), we held that the Crow Tribe could regulate hunting and fishing by nonmembers on land held by the Tribe or held in trust for the Tribe by the United States. But this power could not extend to nonmembers' activities on land they held in fee. Again we relied upon the view of tribal sovereignty set forth in *Oliphant:*

> "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at 565 (footnote omitted).

It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. See, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 65–66 (1978); *Williams* v. *Lee*, 358 U. S. 217, 223 (1959); F. Cohen, Handbook of Federal Indian Law 253 (1982 ed.) (hereafter Cohen) ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing

with criminal jurisdiction"). Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. See, *e. g.*, *Brendale* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 492 U. S. 408 (1989). As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, *supra*, at 565. The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties.

The tribes are, to be sure, "a good deal more than 'private voluntary organizations,'" and are aptly described as "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). In the area of criminal enforcement, however, tribal power does not extend beyond internal relations among members. Petitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. Cf. *Oliphant*, 435 U. S., at 194, and n. 4. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations.

III

Respondents and *amici* argue that a review of history requires the assertion of jurisdiction here. We disagree. The historical record in this case is somewhat less illuminating than in *Oliphant*, but tends to support the conclusion we

reach. Early evidence concerning tribal jurisdiction over nonmembers is lacking because "[u]ntil the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment." *Oliphant, supra,* at 197. Cases challenging the jurisdiction of modern tribal courts are few, perhaps because "most parties acquiesce to tribal jurisdiction" where it is asserted. See National American Indian Court Judges Association, Indian Courts and the Future 48 (1978). We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe's agreement not to exercise its power to exclude an offender from tribal lands, see *infra,* at 696–697.

Respondents rely for their historical argument upon evidence that definitions of "Indian" in federal statutes and programs apply to all Indians without respect to membership in a particular tribe. For example, the federal jurisdictional statutes applicable to Indian country use the general term "Indian." See 18 U. S. C. §§ 1152–1153. In construing such a term in the Act of June 30, 1834, ch. 161, 4 Stat. 733, this Court stated that it "does not speak of members of a tribe, but of the race generally,—of the family of Indians." *United States* v. *Rogers,* 4 How. 567, 573 (1846). Respondents also emphasize that courts of Indian offenses, which were established by regulation in 1883 by the Department of the Interior and continue to operate today on reservations without tribal courts, possess jurisdiction over *all* Indian offenders within the relevant reservation. See 25 CFR § 11.2(a) (1989).

This evidence does not stand for the proposition respondents advance. Congressional and administrative provisions such as those cited above reflect the Government's treatment of Indians as a single large class with respect to *federal* juris-

diction and programs. Those references are not dispositive of a question of *tribal* power to treat Indians by the same broad classification. In *Colville*, we noted the fallacy of reliance upon the fact that member and nonmember Indians may both be "Indians" under a federal definition as proof of federal intent that inherent tribal power must affect them equally:

> "[T]he mere fact that nonmembers resident on the reservation come within the definition of 'Indian' for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a congressional intent to exempt such Indians from State taxation." 447 U. S., at 161.

Similarly, here, respondents' review of the history of *federal* provisions does not sustain their claim of *tribal* power.

We did note in *Wheeler* that federal statutes showed Congress had recognized and declined to disturb the traditional and "undisputed" power of the tribes over members. 435 U. S., at 324–325. But for the novel and disputed issue in the case before us, the statutes reflect at most the tendency of past Indian policy to treat Indians as an undifferentiated class. The historical record prior to the creation of modern tribal courts shows little federal attention to the individual tribes' powers as between themselves or over one another's members. Scholars who do find treaties or other sources illuminating have only divided in their conclusions. Compare Comment, Jurisdiction Over Nonmember Indians on Reservations, 1980 Ariz. S. L. J. 727, 740 (treaties suggest lack of jurisdiction over nonmembers), with Note, Who is an Indian?: *Duro* v. *Reina*'s Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians, 1988 B. Y. U. L. Rev. 161, 170–171 (treaties suggest retention of jurisdiction over nonmembers).

The brief history of the tribal courts themselves provides somewhat clearer guidance. The tribal courts were established under the auspices of the Indian Reorganization Act

of 1934, ch. 576, 48 Stat. 984, codified at 25 U. S. C. §§ 461–479. The 60 years preceding the Act had witnessed a calculated policy favoring elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture. Many Indian leaders and others fought to preserve tribal integrity, however, and the 1930's saw a move toward toleration of Indian self-determination. See generally Cohen 127–153; S. Tyler, A History of Indian Policy 70–150 (1973); A. Debo, A History of the Indians of the United States 201–300 (1970).

The Indian Reorganization Act allowed the expression of retained tribal sovereignty by authorizing creation of new tribal governments, constitutions, and courts. The new tribal courts supplanted the federal courts of Indian offenses operated by the Bureau of Indian Affairs. Significantly, new law and order codes were required to be approved by the Secretary of the Interior. See 25 U. S. C. § 476. The opinions of the Solicitor of the Department of the Interior on the new tribal codes leave unquestioned the authority of the tribe over its members.

Evidence on criminal jurisdiction over nonmembers is less clear, but on balance supports the view that inherent tribal jurisdiction extends to tribe members only. One opinion flatly declares that "[i]nherent rights of self government may be invoked to justify punishment of members of the tribe but not of non members." 1 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917–1974 (Op. Sol.), p. 699 (Nov. 17, 1936). But this opinion refers to an earlier opinion that speaks in broad terms of jurisdiction over Indians generally. 55 I. D. 14, 1 Op. Sol. 445 (Oct. 25, 1934). Another opinion disapproved a tribal ordinance covering all Indians on the ground that the tribal constitution embraced only members. The Solicitor suggested two alternative remedies, amendment of the tribal constitution and delegation of federal authority from the Secretary. 1 Op. Sol. 736 (Mar. 17, 1937). One of these options would reflect a belief that tribes possess

inherent sovereignty over nonmembers, while the other would indicate its absence. Two later opinions, however, give a strong indication that the new tribal courts were not understood to possess power over nonmembers. One mentions only adoption of nonmembers into the tribe or receipt of delegated authority as means of acquiring jurisdiction over nonmember Indians. 1 Op. Sol. 849 (Aug. 26, 1938). A final opinion states more forcefully that the only means by which a tribe could deal with interloping nonmember Indians were removal of the offenders from the reservation or acceptance of delegated authority. 1 Op. Sol. 872 (Feb. 17, 1939).

These opinions provide the most specific historical evidence on the question before us and, we think, support our conclusion. Taken together with the general history preceding the creation of modern tribal courts, they indicate that the tribal courts embody only the powers of *internal* self-governance we have described. We are not persuaded that external criminal jurisdiction is an accepted part of the courts' function.

IV

Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States. Many Indians became citizens during the era of allotment and tribal termination around the turn of the century, and all were made citizens in 1924. See Cohen 142–143 (tracing history of Indian citizenship). That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits. See *United States* v. *Antelope*, 430 U. S. 641 (1977); *Morton* v. *Mancari*, 417 U. S. 535 (1974). In the absence of such legislation, however, Indians like other citizens are embraced within our Nation's "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty." *Oliphant*, 435 U. S., at 210.

Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. *Ibid.* We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334–335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton* v. *Mayes*, 163 U. S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer. See 25 U. S. C. § 1302(6).

Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid* v. *Covert*,

354 U. S. 1 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States* v. *Mazurie*, 419 U. S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish nonmembers in *tribal* court. We decline to produce such a result through recognition of inherent tribal authority.

Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent. This principle finds support in our cases decided under provisions that predate the present federal jurisdictional statutes. We held in *United States* v. *Rogers*, 4 How. 567 (1846), that a non-Indian could not, through his adoption into the Cherokee Tribe, bring himself within the federal definition of "Indian" for purposes of an exemption to a federal jurisdictional provision. But we recognized that a non-Indian could, by adoption, "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages." *Id.*, at 573; see *Nofire* v. *United States*, 164 U. S. 657 (1897).

With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. See, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S., at 56, and n. 7 (noting that Bill of Rights is inapplicable to tribes, and holding that the Indian Civil Rights Act of 1968 does not give rise to a federal cause of action against the tribe for violations of its provisions). This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 172–173 (1982) (STEVENS, J., dissenting).

The United States suggests that Pima-Maricopa tribal jurisdiction is appropriate because petitioner's enrollment in the Torres-Martinez Band of Cahuilla Mission Indians "is a sufficient indication of his self-identification as an Indian, with traditional Indian cultural values, to make it reasonable to subject him to the tribal court system, which . . . implements traditional Indian values and customs." Brief for United States as *Amicus Curiae* 27. But the tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities. See generally Smithsonian Institution, Handbook of North American Indians (1983); H. Driver, Indians of North America (1961); L. Spier, Yuman Tribes of the Gila River (1933). Petitioner's general status as an Indian says little about his consent to the exercise of authority over him by a particular tribe.

The Court of Appeals sought to address some of these concerns by adopting a "contacts" test to determine which nonmember Indians might be subject to tribal jurisdiction. But the rationale of the test would apply to non-Indians on the reservation as readily as to Indian nonmembers. Many non-Indians reside on reservations, and have close ties to tribes through marriage or long employment. Indeed, the population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers, and non-Indians make up some 35% of the Salt River Reservation population. See U. S. Dept of Commerce, Bureau of Census, Supplementary Report, American Indian Areas and Alaska Native Villages: 1980 Census of Population 16–19. The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians. It is a logical consequence of that

decision that nonmembers, who share relevant jurisdictional characteristics of non-Indians, should share the same jurisdictional status.

V

Respondents and *amici* contend that without tribal jurisdiction over minor offenses committed by nonmember Indians, no authority will have jurisdiction over such offenders. They assert that unless we affirm jurisdiction in this case, the tribes will lack important power to preserve order on the reservation, and nonmember Indians will be able to violate the law with impunity.[3] Although the jurisdiction at stake here is over relatively minor crimes, we recognize that protection of the community from disturbances of the peace and other misdemeanors is a most serious matter. But this same interest in tribal law enforcement is applicable to non-Indian reservation residents, whose numbers are often greater. It was argued in *Oliphant* that the absence of tribal jurisdiction over non-Indians would leave a practical, if not legal, void in reservation law enforcement. See Brief for Respondent in *Oliphant* v. *Suquamish Indian Tribe*, O. T. 1977, No. 76–5729. The argument that only tribal jurisdiction could meet the need for effective law enforcement did not provide a basis for finding jurisdiction in *Oliphant;* neither is it sufficient here.

For felonies such as the murder alleged in this case at the outset, federal jurisdiction is in place under the Indian Major Crimes Act, 18 U. S. C. § 1153. The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. See *Brendale* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 492 U. S., at 422. *New Mexico* v. *Mescalero*

[3] We note that a jurisdictional void would remain under the approach of the court below. Affording tribal court jurisdiction over Indians with a sufficient level of contacts to the reservation would presumably leave Indians visiting or passing through the reservation outside the tribe's jurisdiction.

Apache Tribe, 462 U. S. 324, 333 (1983); *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832); Cohen 252. Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

Respondents' major objection to this last point is that, in the circumstances presented here, there may not be any lawful authority to punish the nonmember Indian. State authorities may lack the power, resources, or inclination to deal with reservation crime. Arizona, for example, specifically disclaims jurisdiction over Indian country crimes. Ariz. Const., Art. 20, ¶4. And federal authority over minor crime, otherwise provided by the Indian Country Crimes Act, 18 U. S. C. § 1152, may be lacking altogether in the case of crime committed by a nonmember Indian against another Indian, since § 1152 states that general federal jurisdiction over Indian country crime "shall not extend to offenses committed by one Indian against the person or property of another Indian."

Our decision today does not imply endorsement of the theory of a jurisdictional void presented by respondents and the court below. States may, with the consent of the tribes, assist in maintaining order on the reservation by punishing minor crime. Congress has provided a mechanism by which the States now without jurisdiction in Indian country may assume criminal jurisdiction through Pub. L. 280, see n. 1, *supra*. Our decision here also does not address the ability of neighboring tribal governments that share law enforcement concerns to enter into reciprocal agreements giving each jurisdiction over the other's members. As to federal jurisdiction under § 1152, both academic commentators and the dissenting judge below have suggested that the statute could be construed to cover the conduct here. See 851 F. 2d, at 1150–

1151 (Sneed, J., dissenting); 1980 Ariz. S. L. J., at 743–745. Others have disagreed. That statute is not before us and we express no views on the question.

If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs. We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens. The judgment of the Court of Appeals is hereby

Reversed.

JUSTICE BRENNAN with whom JUSTICE MARSHALL joins, dissenting.

The Court today holds that an Indian tribal court has no power to exercise criminal jurisdiction over a defendant who is an Indian but not a tribal member. The Court concedes that Indian tribes never expressly relinquished such power. Instead, the Court maintains that tribes *implicitly* surrendered the power to enforce their criminal laws against nonmember Indians when the tribes became dependent on the Federal Government. Because I do not share such a parsimonious view of the sovereignty retained by Indian tribes, I respectfully dissent.

I

The powers of Indian tribes are "'*inherent powers of a limited sovereignty which has never been extinguished.*'" *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)). When the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised. In *Wheeler*, we explained:

> "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." 435 U. S., at 323 (citations omitted).

By becoming "domestic dependent nations," Indian tribes were divested of any power to determine their external relations. See *id.*, at 326. Tribes, therefore, have no inherent power to enter into direct diplomatic or commercial relations with foreign nations. See *Worcester* v. *Georgia*, 6 Pet. 515, 559–560 (1832); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17–18 (1831). In addition, Indian tribes may not alienate freely the land they occupy to non-Indians. See *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974); *Johnson* v. *McIntosh*, 8 Wheat. 543, 604 (1823). A tribe is implicitly divested of powers to have external relations because they are *necessarily* inconsistent with the overriding interest of the greater sovereign. See *Brendale* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 492 U. S. 408, 451 (1989) (BLACKMUN, J., dissenting).

By contrast, we have recognized that tribes did not "surrender [their] independence—[the] right to self-government, by associating with a stronger [power], and taking its protection." *Worcester*, *supra*, at 560–561. Tribes have retained "the powers of self-government, including the power to prescribe and enforce internal criminal laws." *Wheeler*, *supra*, at 326. I agree with the Court that "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Ante*, at 685. I disagree with the Court that *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 212 (1978), "recognized that the tribes can no longer be described

as sovereigns in this sense." *Ante*, at 685. In *Oliphant*, the Court held that tribes did not have the power to exercise criminal jurisdiction over *non-Indians* because such power was inconsistent with the overriding national interest. But it does not follow that because tribes lost their power to exercise criminal jurisdiction over non-Indians, they also lost their power to enforce criminal laws against Indians who are not members of their tribe.

A

In *Oliphant*, the Court did not point to any statutes or treaties *expressly* withdrawing tribal power to exercise criminal jurisdiction over nonmembers, but instead held that the tribe was *implicitly* divested of such power. The Court today appears to read *Oliphant* as holding that the exercise of criminal jurisdiction over anyone but members of the tribe is inconsistent with the tribe's dependent status. See *ante*, at 686.[1] But *Oliphant* established no such broad principle.

[1] The Court also contends that a "[l]iteral application" of *United States* v. *Wheeler*, 435 U. S. 313 (1978), would bring this case to an end, for *Wheeler* states that "tribes 'cannot try nonmembers in tribal courts.'" *Ante*, at 685 (quoting *Wheeler*, *supra*, at 326). In *Wheeler*, the Court held that the Double Jeopardy Clause was not violated by successive prosecution of a tribal member in a tribal court and then in a federal court because the prosecutions were conducted by different sovereigns. In answering the double jeopardy question, the Court was required to consider the source of tribal power to punish its own members, and the Court unequivocally stated that the power to punish members was part of the tribe's retained sovereignty. 435 U. S., at 326. The statement quoted above, however, amounts to nothing more than an inaccurate description of the holding in *Oliphant*. 435 U. S., at 326 (citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978)). Moreover, given that the defendant in *Wheeler* was a *member* of the Tribe that tried him, the discussion of tribal power over nonmembers, also quoted by the Court today, *ante*, at 686, was dictum.

In transmuting this dictum into law, the Court relies on language from *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 161 (1980), stating that nonmembers "'stand on the same footing as non-Indians resident on the reservation.'" *Ante*, at 687 (quoting *Colville*, *supra*, at 161). But this reliance is misplaced because the language is found

Rather, the holding in *Oliphant*, *supra*, was based on an analysis of Congress' actions *with respect to non-Indians*. The Court first considered the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." *Id.*, at 206. Then the Court declared that the power to punish non-Indians was inconsistent with the tribes' dependent status, for such power conflicted with the overriding interest of the Federal Government in protecting its citizens against "unwarranted intrusions" on their liberty. See *id.*, at 208–212. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily [gave] up their power to try *non-Indian* citizens of the

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in the Court's discussion of the *State's* power over nonmember Indians rather than a discussion of the tribe's power. We have not allowed States to regulate activity on a reservation that interferes with principles of tribal self-government. See *Colville*, 447 U. S., at 161. Thus in *Colville*, we held that the State could tax nonmembers who purchased cigarettes on a reservation; such taxation would not interfere with tribal self-government because nonmembers are not constituents of the tribe. See *ibid.* Yet at the same time, we held that the tribe could *also* tax the nonmember purchasers because the power to tax was not implicitly divested as inconsistent with the overriding interests of the Federal Government. See *id.*, at 153.

Similarly, the Court's citation to *Montana* v. *United States*, 450 U. S. 544 (1981), for the "'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" *ante*, at 687 (quoting *Montana*, *supra*, at 565), is also inapposite. In *Montana*, the Court concluded that the Tribe could regulate hunting and fishing by nonmembers on lands held by the Tribe, but not on lands within the reservation no longer held by the Tribe. See 450 U. S., at 564. The Court recognized, however, that tribes have, as a matter of inherent sovereignty, power over nonmembers when they engage in consensual relationships with tribal members and when their conduct "threatens or has some direct effect on the political integrity, the economic stability, or the health or welfare of the tribe." *Id.*, at 566 (citations omitted). The Court today provides no explanation for why the exercise of criminal jurisdiction over a nonmember who commits a crime on property held by the tribe involves different concerns, see *ante*, at 688, such that tribes were implicitly divested of that power.

United States except in a manner acceptable to Congress." *Id.*, at 210 (emphasis added).

A consideration of the relevant congressional enactments reveals that the opposite conclusion is appropriate with respect to nonmember Indians. In 1790, when Congress first addressed the rules governing crimes in Indian country, it made crimes committed by citizens or inhabitants of the United States against Indians punishable according to the laws of the State in which the offense occurred and directed the state courts to take jurisdiction of such offenses. See The Trade and Intercourse Act of 1790, 1 Stat. 138, ch. 33. In 1817, Congress withdrew that jurisdiction from the States and provided for federal jurisdiction (and the application of federal enclaves law) over crimes committed within Indian country. Congress made an explicit exception for crimes committed by an Indian against another Indian, however: "[N]othing in this act shall be so construed . . . to extend to any offence committed by one Indian against another, within any Indian boundary." 3 Stat. 383, ch. 92, codified, as amended, at 18 U. S. C. § 1152. In 1854, Congress again amended the statute to proscribe prosecution in federal court of an Indian who had already been tried in tribal court. 10 Stat. 270, ch. 30. Finally, in 1885, Congress made a limited but significant departure from its consistent practice of leaving to Indian tribes the task of punishing crimes committed by Indians against Indians. In response to this Court's decision in *Ex parte Crow Dog*, 109 U. S. 556, 571 (1883), which held that there was no federal jurisdiction over an Indian who murdered another member of his tribe, Congress passed the Indian Major Crimes Act, 23 Stat. 385, ch. 341, codified, as amended, at 18 U. S. C. § 1153, under which certain enumerated crimes, including murder, manslaughter, and arson, fall within federal jurisdiction when involving two Indians.

In *Oliphant*, the Court relied on this statutory background to conclude that the exercise of tribal jurisdiction over non-

Indians was inconsistent with the tribes' dependent status, for from the early days Congress had provided for federal jurisdiction over crimes involving non-Indians. Thus, from these affirmative enactments, it could be inferred that the tribes were tacitly divested of jurisdiction over non-Indians. See *Oliphant*, 435 U. S., at 199–206. But applying the same reasoning, the opposite result obtains with respect to tribal jurisdiction over nonmember Indians. From the very start, Congress has consistently exempted Indian-against-Indian crimes from the reach of federal or state power; although the exemption in the 1790 statute was implicit, it was made explicit in the 1817 Act. Moreover, the provision in the 1854 Act exempting from federal jurisdiction any Indian who had been previously punished by a tribal court amounts to an express acknowledgment by Congress of tribal jurisdiction over Indians who commit crimes in Indian country. The appropriate inference to be drawn from this series of statutes excluding Indian-against-Indian crimes from federal jurisdiction is that tribes retained power over those crimes involving only Indians. See *Wheeler*, 435 U. S., at 324–326.

The Court acknowledges that these enactments support the inference that tribes retained power over *members* but concludes that no such inference can be drawn about tribal power over *nonmembers*. The Court finds irrelevant the fact that we have long held that the term "Indian" in these statutes does not differentiate between members and nonmembers of a tribe. See *United States* v. *Kagama*, 118 U. S. 375, 383 (1886); see also *United States* v. *Rogers*, 4 How. 567, 573 (1846) (the exception "does not speak of members of a tribe, but of the race generally,—of the family of Indians"). Rather, the Court concludes that the federal definition of "Indian" is relevant only to *federal* jurisdiction and is "not dispositive of a question of *tribal* power." *Ante*, at 690. But this conclusion is at odds with the analysis in *Oliphant* in which the congressional enactments served as evidence of a "commonly shared presumption" that tribes had

ceded their power over non-Indians. Similarly, these enactments reflect the congressional presumption that tribes had power over all disputes between Indians regardless of tribal membership.[2]

By refusing to draw this inference from repeated congressional actions, the Court today creates a jurisdictional void in which neither federal nor tribal jurisdiction exists over nonmember Indians who commit minor crimes against another

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[2] The Court concedes that the statutes reflect a "tendency of past Indian policy to treat Indians as an undifferentiated class." *Ante*, at 690. Nevertheless the Court rejects the logical implications of such a policy, reasoning that "[t]he historical record prior to the creation of modern tribal courts shows little federal attention to the individual tribes' power as between themselves or over one another's members." *Ibid.*

To the contrary, the historical record reveals that Congress and the Executive had indeed considered the question of intertribal crime. In 1834, Congress proposed the Western Territories bill that would have relocated all Indians to the western part of the United States. One provision would have created a General Council to regulate commerce among the various tribes, preserve peace, and punish intertribal crimes. See H. R. Rep. No. 474, 23d Cong., 1st Sess., 36 (1834). Although the bill never passed, it clearly shows that Congress assumed that the Indians would police intertribal disputes. See *Oliphant*, 435 U. S., at 202 (relying on different provision of bill). In addition, it is clear that the Executive Branch considered the question of intertribal disputes. In 1883, the Solicitor of the Department of the Interior issued an opinion, adopted by the Attorney General, dealing with the question of federal jurisdiction over an Indian accused of murdering a member of another Tribe. Presaging this Court's holding in *Ex parte Crow Dog*, 109 U. S. 556 (1883), by a few months, the Attorney General concluded that there was no federal jurisdiction over the crime because it fell within the Indian-against-Indian exception. 17 Op. Atty. Gen. 566 (1883). The opinion concluded: "If no demand for Foster's surrender shall be made by one or other of the tribes concerned, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question . . . it seems that nothing remains except to discharge him." *Id.*, at 570. Given the proximity of this incident to the Crow Dog incident, it is implausible to conclude that Congress did not consider the situation of intertribal crimes when passing the Indian Major Crimes Act.

Indian.[3] The Court's conclusion that such a void does not counsel in favor of finding tribal jurisdiction, see *ante*, at 696, misses the point. The existence of a jurisdictional gap is not an independent justification for finding tribal jurisdiction, but rather is relevant to determining congressional intent. The unlikelihood that Congress intended to create a jurisdictional void in which *no* sovereign has the power to prosecute an entire class of crimes should inform our understanding of the assumptions about tribal power upon which Congress legislated. See *Oliphant*, *supra*, at 206 ("'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the as-

[3] Because of the Indian-against-Indian exception in 18 U. S. C. § 1152, federal courts have no jurisdiction over such crimes. In addition, it has long been accepted that States do not have power to exercise criminal jurisdiction over crimes involving Indians on the reservation. See *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832). In 1953, however, Congress enacted Pub. L. 280, codified, as amended, at 18 U. S. C. § 1162, which allows named States to assume jurisdiction over all crimes within Indian country. In § 401(a) of the Indian Civil Rights Act of 1968 (ICRA), 82 Stat. 79, codified at 25 U. S. C. § 1321(a), Congress modified Pub. L. 280 to require the affected tribe to consent to a State's assumption of jurisdiction. Arizona has not accepted jurisdiction over crimes occurring on Indian reservations. Thus, under the Court's holding today, the tribe, the Federal Government, and the State each lack jurisdiction to prosecute the crime involved in this case.

The Court erroneously equates the jurisdictional void that resulted from the holding in *Oliphant* with the void created by the opinion today. Since federal courts have jurisdiction over crimes involving non-Indians, any "void" resulting from the holding in *Oliphant* would have been caused by the discretionary decision of the Federal Government not to exercise its already-established jurisdiction. Such a "practical" void, *ante*, at 696, is a far cry from the "legal" void, *ibid.*, created today, in which no sovereign has the power to prosecute an entire class of crimes.

sumptions of those who drafted them") (citations omitted); *Rogers*, 4 How., at 573 ("It can hardly be supposed that Congress intended to" treat whites "adopted" by Indians as fitting within the Indian-against-Indian exception). Since the scheme created by Congress did not differentiate between member and nonmember Indians, it is logical to conclude that Congress did not assume that the power retained by tribes was limited to member Indians.

B

The Court also concludes that because Indians are now citizens of the United States, the exercise of criminal jurisdiction over a nonmember of the tribe is inconsistent with the tribe's dependent status. Stated differently, the Court concludes that regardless of whether tribes were assumed to retain power over nonmembers as a historical matter, the tribes were implicitly divested of this power in 1924 when Indians became full citizens. See *ante*, at 692 ("Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States"). The Court reasons that since we held in *Oliphant* that the exercise of criminal jurisdiction over non-Indians conflicted with the Federal Government's "'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty,'" *ante* at 692 (quoting *Oliphant*, 435 U. S., at 210), the exercise of criminal jurisdiction over nonmember Indians is also inconsistent with this overriding national interest.

There are several problems with this argument. First, in *Oliphant* the Court held merely that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress*." *Oliphant*, *supra*, at 210 (emphasis added). The touchstone in determining the extent to which citizens can be

subject to the jurisdiction of Indian tribes, therefore, is whether such jurisdiction is acceptable to Congress. Cf. *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154 (1980) ("[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"). In *Oliphant*, federal statutes made clear that the prosecution of non-Indians in tribal courts is *not* acceptable to Congress. By contrast, the same statutes reflect the view that the prosecution of all Indians in tribal courts *is* acceptable to Congress.

Moreover, this argument proves too much. If tribes were implicitly divested of their power to enforce criminal laws over nonmember Indians once those Indians became citizens, the tribes were also implicitly divested of their power to enforce criminal laws over their own *members* who are now citizens as well. The Court contends, however, that tribal members are subject to tribal jurisdiction because of "the voluntary character of tribal membership and the concomitant right of participation in a tribal government." *Ante*, at 694. But we have not required consent to tribal jurisdiction or participation in tribal government as a prerequisite to the exercise of civil jurisdiction by a tribe, see *Williams* v. *Lee*, 358 U. S. 217, 223 (1959), and the Court does not explain why such a prerequisite is uniquely salient in the criminal context. Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. If such were the case, a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws. See, *e. g.*, *United States* v. *Verdugo-Urquidez*, 494 U. S. 259 (1990); *id.*, at 279–281 (BRENNAN, J., dissenting). The commission of a crime on the reservation is all the "consent" that is necessary to allow the tribe to exercise criminal jurisdiction over the nonmember Indian.

Finally, the Court's "consent" theory is inconsistent with the underlying premise of Indian law, namely, that Congress

has plenary control over Indian affairs. Congress presumably could pass a statute affirmatively granting Indian tribes the right to prosecute anyone who committed a crime on the reservation—Indian or non-Indian—unconstrained by the fact that neither of these groups participate in tribal government.[4] It is therefore unclear why the exercise of power retained by the tribes—power not divested by Congress—is subject to such a constraint.

More understandable is the Court's concern that nonmembers may suffer discrimination in tribal courts because such courts are "influenced by the unique customs, languages, and usages of the tribes they serve." *Ante*, at 693. But Congress addressed this problem when it passed the ICRA, 25 U. S. C. § 1301 *et seq.*, which extended most of the Bill of Rights to any person tried by a tribal court.[5] See *Santa*

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[4] The Court's suggestion that there might be some independent constitutional limitation on the ability of Congress to subject its citizens to prosecution by tribal courts that do not provide a criminal defendant constitutional rights, see *ante*, at 693–694, is unpersuasive given that Congress has, through the ICRA, 25 U. S. C. § 1301 *et seq.*, extended to those tried by a tribal court most of the protections of the Bill of Rights, see n. 5, *infra*, most importantly, the right to due process. 25 U. S. C. § 1302(8). Moreover, the Court's argument proves too much, for it does not account for why members who are also citizens would be subject to tribal jurisdiction; participation in tribal government cannot in and of itself constitute a knowing and intelligent waiver of constitutional rights.

[5] The ICRA provides, in relevant part, that a tribe shall not:

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure . . . ;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

. . . . . .

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process

Clara Pueblo v. *Martinez*, 436 U. S. 49, 63 (1978). In addition, the ICRA provides the remedy of habeas corpus to challenge the legality of any detention order by a tribe. 25 U. S. C. § 1303. The equal protection provision, § 1302(8), requires that nonmembers not be subject to discriminatory treatment in the tribal courts.[6] In addition, the due process clause, *ibid.*, ensures that each individual is tried in a fundamentally fair proceeding.

II

This country has pursued contradictory policies with respect to the Indians. Since the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, ch. 576, § 1, codified at 25 U. S. C. § 461, however, Congress has followed a policy of promoting the independence and self-government of the vari-

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for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments . . . ;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons." 25 U. S. C. § 1302.

[6] Petitioner argues that the exercise of jurisdiction over a nonmember violates the equal protection provision of the ICRA, 25 U. S. C. § 1302(8), because the Tribe does not exercise jurisdiction over non-Indians. This argument is without merit. The statutory equal protection provision requires the Tribe to refrain from denying "to any person *within its jurisdiction* the equal protection of its laws." *Ibid.* (emphasis added). Thus, petitioner's argument simply begs the question of who is within the Tribe's jurisdiction. If nonmember Indians are subject to the criminal jurisdiction of the Tribe, the exercise of jurisdiction in this case does not violate the equal protection provision of the ICRA. Petitioner would state a valid equal protection claim, however, if he could show that in the exercise of its jurisdiction, the Tribe treated him differently than others who are also subject to its jurisdiction.

ous tribes. The Court's decision today not only ignores the assumptions on which Congress originally legislated with respect to the jurisdiction over Indian crimes, but also stands in direct conflict with current congressional policy. I respectfully dissent.

UNITED STATES *v.* MONTALVO-MURILLO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 89–163. Argued January 9, 1990—Decided May 29, 1990

A provision of the Bail Reform Act of 1984, 18 U. S. C. § 3142(e), requires that a suspect held in pretrial custody on federal criminal charges be detained if, "after a hearing pursuant to . . . subsection (f)," he is found to pose a risk of flight and a danger to others or the community and if no condition of release can give reasonable assurances against these contingencies. Section 3142(f) provides that, before detention can occur, a judicial officer "shall" conduct a hearing "immediately upon the person's first appearance before the . . . officer" unless he grants a continuance. Respondent was arrested on federal drug charges, and a Magistrate, at a detention hearing held after respondent's "first appearance" and after continuances granted beyond the period permitted by the Act, ordered his release on bond. The District Court, while finding that no conditions reasonably could assure his appearance or the community's safety, held that the detention hearing had not been held upon respondent's first appearance and that pretrial release was the appropriate remedy for violation of the statutory requirement. The Court of Appeals affirmed. Upon issuance of the court's mandate, respondent was released, took flight, and remains at large. He is, however, represented by counsel before this Court.

Held:

1. Respondent's flight does not render the case moot, for the resolution of this dispute determines the course of proceedings if and when he is rearrested on the charges now pending. P. 713.

2. In light of the disposition of this case, the Government may detain respondent at once upon his rearrest without first seeking revocation of the existing release order. Pp. 713–714.

3. The failure to comply with the Act's prompt hearing provision does not require release of a person who should otherwise be detained. Pp. 716–722.

(a) Neither the time requirements nor any other part of the Act indicates that compliance with the first appearance requirement is a precondition to holding the hearing or that failure to comply so subverts § 3142(f)'s procedural scheme as to invalidate the hearing. There is no presumption or rule that for every mandatory duty imposed upon the court or the Government or its prosecutors there must exist some corol-

lary punitive sanction for departures or omissions, even if negligent. See *French* v. *Edwards*, 13 Wall. 506, 511; *Brock* v. *Pierce County*, 476 U. S. 253, 260. If Congress' mere use of the word "shall" operated to bar all authority to seek pretrial detention once the time limit had passed, then any other violation of subsection (f)'s procedures—such as the right to be represented by counsel, present witnesses and evidence, testify, and cross-examine witnesses—no matter how insignificant, would also prevent a hearing from being "a hearing pursuant to" the statute. Respondent's argument that these other infringements could be subject to a harmless-error analysis cannot be reconciled with his contention that absolute compliance with the timely hearing requirement is necessary. Pp. 716–719.

(b) Automatic release contravenes the statutory purpose of providing fair bail procedures while protecting the public's safety and assuring a defendant's appearance at trial. There is no reason to bestow a windfall upon the defendant and visit a severe penalty upon the Government and citizens every time some deviation occurs where the Government and the courts have made diligent efforts, or even where the Government bears some of the responsibility for the hearing's delay. An order of release in the face of the Government's ability to prove that detention is required has neither causal nor proportional relation to any harm caused by the delay in holding the hearing, since release would not restore the benefits of a timely hearing to a defendant who has already suffered from the inconvenience and uncertainty of the delay. Thus, once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing and make its case to detain. Pp. 719–722.

(c) This ruling is consistent with the rule of *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 256, that a nonconstitutional error is harmless unless it has a "substantial influence" on the outcome of the proceedings. Here, detention was harmless because respondent, as an individual likely to flee, would have been detained if his hearing had been held upon his first appearance rather than a few days later. P. 722.

876 F. 2d 826, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 722.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Jeffrey P. Minear*.

Bernard J. Panetta II argued the cause and filed a brief for respondent.

JUSTICE KENNEDY delivered the opinion of the Court.

Both the District Court, 713 F. Supp. 1407 (NM 1989), and the Court of Appeals for the Tenth Circuit, 876 F. 2d. 826 (1989), found that one Montalvo-Murillo, a suspect held in pretrial custody on federal criminal charges, posed a risk of flight and a danger to the community. Because no condition of release could give reasonable assurances against these contingencies, detention was required by the Bail Reform Act of 1984, 18 U. S. C. § 3142(e). The District Court and Court of Appeals held, nevertheless, that Montalvo-Murillo must be released because there had been a failure to observe the Act's directions for a timely hearing. § 3142(f). To no one's great surprise, the suspect became a fugitive after his release and is still at large.

We granted certiorari, 493 U. S. 807 (1989), to resolve a split among the Courts of Appeals on whether failure to comply with the prompt hearing provision of the Act requires the release of a person who is a flight risk or a danger to other persons or the community.* We decide that the Act does not require release and so we reverse the Court of Appeals. Montalvo-Murillo, though now a fugitive, is the respondent here and is represented by appointed counsel. Respondent's flight does not render the case moot, for our resolution of the dispute determines the course of proceedings if and when he is rearrested on the charges now pending. Since we reverse, the Government may detain respondent at once upon

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*Compare *United States* v. *Vargas*, 804 F. 2d 157, 162 (CA1 1986) (violation of the time limits specified in the Act does not prevent the Government from seeking pretrial detention at a subsequent detention hearing); *United States* v. *Clark*, 865 F. 2d 1433, 1436 (CA4 1989) (en banc); and *United States* v. *Hurtado*, 779 F. 2d 1467, 1481–1482 (CA11 1985) (en banc), with *United States* v. *Al-Azzawy*, 768 F. 2d 1141, 1145 (CA9 1985) (failure to observe the time limits precludes detention).

his rearrest without first seeking revocation of the existing release order. See 18 U. S. C. § 3148(b).

I

Two provisions of the Bail Reform Act of 1984 are relevant. The substantive provisions that allow detention are contained in subsection (e):

> "DETENTION.—If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, [he] shall order the detention of the person before trial. . . ." § 3142(e).

The controversy in this case centers around the procedures for a hearing, found in subsection (f):

> "DETENTION HEARING.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community—
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> . . . . . .
>
> "The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, such person shall be detained . . . . The person may be detained pending completion of the hearing. . . ." § 3142(f).

We review the sequence of events to put the statutory issue in proper context. On Wednesday, February 8, 1989, United States Customs Service agents stopped respondent at a New Mexico checkpoint near the international border.

The agents discovered approximately 72 pounds of cocaine hidden in respondent's truck. Admitting his plan to link with cocaine purchasers in Chicago, Illinois, respondent agreed to cooperate with the Drug Enforcement Administration (DEA) and to make a controlled delivery under Government surveillance. The DEA took respondent and his truck to Chicago in an attempt to complete the transaction, but the anticipated purchasers did not arrive at the delivery point.

The Government then arranged to transfer respondent back to New Mexico, where a criminal complaint had been filed charging him with possession of cocaine with intent to distribute, in violation of 21 U. S. C. § 841. Before his departure, respondent was brought before a Magistrate in the Northern District of Illinois for a transfer hearing pursuant to Federal Rule of Criminal Procedure 40. The hearing was held on Friday, February 10, two days after the initial arrest in New Mexico. Respondent was represented by counsel, and it appears that all parties and the Magistrate agreed that the detention hearing would be held in New Mexico, where the charges were pending. Respondent was returned to New Mexico that same evening.

The weekend intervened. On Monday, February 13, the DEA asked the United States Magistrate's office in New Mexico to schedule a detention hearing. A hearing was convened on Thursday, February 16, and respondent attended with retained counsel. Because the Pretrial Services Office had not yet prepared a report, the Magistrate, *sua sponte*, ordered a 3-day continuance, but, observing that the following Monday was a federal holiday, scheduled the hearing for Tuesday, February 21. The record shows no request for a waiver of the time limits, no advice to respondent of the right to a hearing within the time provided by the Act, no finding of good cause for continuance, and no objection to continuance by either party. The detention hearing was held as scheduled on February 21. The Magistrate, unconvinced that respondent was a flight risk or danger to other persons

or to the community, decided to order release of respondent upon the posting of a $50,000 bond and compliance with other conditions. The Government at once sought review in the District Court.

After holding a *de novo* detention hearing, on Thursday, February 23, the District Court agreed with the Government that no condition or combination of conditions reasonably would assure respondent's appearance or the safety of the community. Nevertheless, it ordered respondent's release. The court found that the detention hearing had not been held upon respondent's first appearance as specified by § 3142(f), and that pretrial release on conditions was the appropriate remedy for violation of the statutory requirement. The Court of Appeals affirmed. Upon issuance of its mandate, respondent was released and took flight.

Though the Government notes that the statutory phrase "first appearance" is by no means clear, either as an abstract matter or as applied in this case, it does not challenge the Court of Appeals' holding that respondent's detention hearing was held after that event and that continuances were beyond what the Act permits. We decide the case on those same assumptions, though without passing upon them. The sole question presented on certiorari is whether the Court of Appeals was correct in holding that respondent must be released as a remedy for the failure to hold a hearing at his first appearance.

II

In *United States* v. *Salerno*, 481 U. S. 739 (1987), we upheld the Bail Reform Act of 1984 against constitutional challenge. Though we did not refer in *Salerno* to the time limits for hearings as a feature which sustained the constitutionality of the Act, we recognize that a vital liberty interest is at stake. A prompt hearing is necessary, and the time limitations of the Act must be followed with care and precision. But the Act is silent on the issue of a remedy for violations of its time limits. Neither the timing requirements nor any

other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained.

The Act, as quoted above, requires pretrial detention of certain persons charged with federal crimes and directs a judicial officer to detain a person charged, pending trial, if the Government has made the necessary showing of dangerousness or risk of flight. 18 U. S. C. §§ 3142(e), (f). The Act authorizes detention "after a hearing [held] pursuant to the provisions of subsection (f) of this section." § 3142(e). Subsection (f) provides that "[t]he judicial officer shall hold a hearing" and sets forth the applicable procedures. Nothing in § 3142(f) indicates that compliance with the first appearance requirement is a precondition to holding the hearing or that failure to comply with the requirement renders such a hearing a nullity. It is conceivable that some combination of procedural irregularities could render a detention hearing so flawed that it would not constitute "a hearing pursuant to the provisions of subsection (f)" for purposes of § 3142(e). A failure to comply with the first appearance requirement, however, does not so subvert the procedural scheme of § 3142(f) as to invalidate the hearing. The contrary interpretation—that noncompliance with the time provisions in § 3142(f) requires the release even of a person who presumptively should be detained under § 3142(e)—would defeat the purpose of the Act.

We hold that a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged. We reject the contention that if there has been a deviation from the time limits of the statute, the hearing necessarily is not one conducted "pursuant to the provisions of subsection (f)." There is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent. See *French* v. *Edwards*,

13 Wall. 506, 511 (1872) ("[M]any statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual"). In our view, construction of the Act must conform to the "'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Brock* v. *Pierce County*, 476 U. S. 253, 260 (1986) (quoting *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125 (1886)).

In *Brock* v. *Pierce County*, *supra*, the Court addressed a statute that stated that the Secretary of Labor "shall" act within a certain time on information concerning misuse of federal funds. The respondent there argued that a failure to act within the specified time divested the Secretary of authority to act to investigate a claim. We read the statute to mean that the Secretary did not lose the power to recover misused funds after the expiration of the time period. Congress' mere use of the word "shall" was not enough to remove the Secretary's power to act. *Id.*, at 260 (footnote omitted) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act").

In a similar manner, in this case the word "shall" in the Act's hearing time requirement does not operate to bar all authority to seek pretrial detention once the time limit has passed. Although the duty is mandatory, the sanction for breach is not loss of all later powers to act. The argument that failure to comply with the Act's time limits prohibits the Government from moving for detention proves too much. If any variation from the time limits of subsection (f) prevents a

detention hearing from being "a hearing pursuant to subsection (f)," then the same would have to be true of any deviation from the other procedures prescribed by §3142(f). During the hearing, a person is entitled to be represented by counsel, present witnesses, testify on his own behalf, cross-examine Government witnesses, and present additional evidence. §3142(f). If we suppose an error that infringes any of these rights in an insignificant way, we doubt that anyone would make the serious contention that a hearing, otherwise perfect, is not "a hearing pursuant to" the statute because such an error occurred. Nor should a hearing held after the person's first appearance prevent detention.

To avoid the logical implications of his argument with regard to procedural violations other than timeliness, respondent admits that other infringements could be subject to a harmless-error analysis. This position cannot be reconciled with respondent's contention that absolute compliance with the provisions of subsection (f) is mandated by subsection (e). If a failure to follow the provisions of subsection (f) with respect to timeliness means that a condition precedent for detention is lacking, then a failure to comply with the other provisions of subsection (f) would have the same effect. It is no answer to respond that a hearing that violates some of the procedural requirements of subsection (f) may still be "fair," while a hearing held after the person's first appearance cannot be "prompt." If there has been a failure to observe the time limits of the Act, it does not follow that there must be a presumption of prejudice, either as an empirical matter or based on our precedents. We need seek only a practical remedy, not one that strips the Government of all authority to act. *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988).

Our conclusion is consistent with the design and function of the statute. We have sustained the Bail Reform Act of 1984 as an appropriate regulatory device to assure the safety of persons in the community and to protect against the risk of

flight. We have upheld the substantive right to detain based upon the Government's meeting the burden required by the statute. *United States* v. *Salerno*, 481 U. S. 739 (1987). Automatic release contravenes the object of the statute: to provide fair bail procedures while protecting the safety of the public and assuring the appearance at trial of defendants found likely to flee. The end of exacting compliance with the letter of § 3142(f) cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent. See S. Rep. No. 98–225, p. 3 (1983) ("Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released"). The Government's interest in preventing these harms remains real and substantial even when the time limits have been ignored. The safety of society does not become forfeit to the accident of noncompliance with statutory time limits where the Government is ready and able to come forward with the requisite showing to meet the burden of proof required by the statute.

Assessing the situation in realistic and practical terms, it is inevitable that, despite the most diligent efforts of the Government and the courts, some errors in the application of the time requirements of § 3142(f) will occur. Detention proceedings take place during the disordered period following arrest. As this case well illustrates, circumstances such as the involvement of more than one district, doubts about whether the defendant was subject to temporary detention under § 3142(d), and ambiguity in requests for continuances may contribute to a missed deadline for which no real blame can be fixed. In these situations, there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of § 3142(f) occurs.

In the case before us, of course, it is not clear that the Government bears the responsibility for the delay, for the Magistrate continued the hearing *sua sponte* when the Government announced that it was ready to proceed. But even on the assumption that a violation of the Act occurred and that the Government should bear some of the responsibility for it, the Court of Appeals erred in holding that the Government is barred from proceeding under the Act.

We find nothing in the statute to justify denying the Government an opportunity to prove that the person is dangerous or a risk of flight once the statutory time for hearing has passed. We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits. Magistrates and district judges can be presumed to insist upon compliance with the law without the threat that we must embarrass the system by releasing a suspect certain to flee from justice, as this one did in such a deft and prompt manner. The district court, the court of appeals, and this Court remain open to order immediate release of anyone detained in violation of the statute. Whatever other remedies may exist for detention without a timely hearing or for conduct that is aggravated or intentional, a matter not before us here, we hold that once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing and make its case to detain based upon the requirements set forth in the statute.

An order of release in the face of the Government's ability to prove at once that detention is required by the law has neither causal nor proportional relation to any harm caused by the delay in holding the hearing. When a hearing is held, a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him. Release would not restore these benefits to him. *United States* v. *Morrison*, 449 U. S. 361, 364 (1981) (remedies should be tailored to the injury suf-

fered). This case is similar to *New York* v. *Harris*, *ante*, p. 14, in which we held that an unlawful arrest does not require a release and rearrest to validate custody, where probable cause exists. In this case, a person does not become immune from detention because of a timing violation.

Our ruling is consistent also with *Bank of Nova Scotia* v. *United States*, 487 U. S., at 256, where we held that nonconstitutional error will be harmless unless the court concludes from the record as a whole that the error may have had a "substantial influence" on the outcome of the proceeding. In this case, it is clear that the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding. Because respondent was dangerous and likely to flee, he would have been detained if his hearing had been held upon his first appearance rather than a few days later. On these facts, the detention was harmless. See *ibid.*; *Morrison*, *supra*, at 364–367 (inappropriate to dismiss indictment because of Sixth Amendment violation that had no adverse impact on proceedings). This approach is consistent with the principle of harmless-error analysis that is the governing precept in most matters of criminal procedure. Fed. Rule Crim. Proc. 52. We have no need to consider in this case the remedies available to a person detained beyond the statutory limit and later found eligible for release. We hold that respondent was not, and is not, entitled to release as a sanction for the delay in the case before us.

The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case involves two lawbreakers. Respondent, as the Court repeatedly argues, *ante*, at 713, 716, 721, failed to appear after his release on bail, an apparent violation of 18 U. S. C. § 3146. Even before that, however, the Government imprisoned respondent without a timely hearing, a conceded

violation of § 3142.[1] In its haste to ensure the detention of respondent, the Court readily excuses the Government's prior and proven violation of the law. I cannot agree.

I

Before examining the consequences that follow from the Government's violation of § 3142, it is well to remember the magnitude of the injury that pretrial detention inflicts and the departure that it marks from ordinary forms of constitutional governance. Executive power to detain an individual is the hallmark of the totalitarian state. Under our Constitution the prohibition against excessive bail,[2] the Due Process Clause of the Fifth Amendment,[3] the presumption of innocence[4]—indeed, the fundamental separation of pow-

[1] Respondent's absence is irrelevant to the merits of the question upon which we granted certiorari. Its only bearing on this case is that it counsels utmost caution in our consideration because the adversarial character of the litigation may have been compromised. See *United States* v. *Sharpe*, 470 U. S. 675, 721 (1985) (STEVENS, J., dissenting).

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amdt. 8.

[3] We have recognized that delay of a hearing related to detention itself can violate constitutional guarantees of due process. See *Gerstein* v. *Pugh*, 420 U. S. 103, 125–126 (1975) (state pretrial detention requires a "timely judicial determination" of probable cause before or promptly after arrest); cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 485 (1972) (preliminary hearing is required "promptly after a parole violator's arrest); *id.*, at 488 (parole revocation hearing "must be tendered within a reasonable time after the parolee is taken into custody").

[4] "It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U. S. C. § 2385, Justice Jackson wrote:

'Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in

ers among the Legislative, the Executive and the Judicial Branches of Government[5]—all militate against this abhorrent practice. Our historical approach eschewing detention prior to trial reflects these concerns:

> "From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson* v. *Parker*, 156 U. S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951).

Sections 3142(e) and (f), allowing limited detention of arrestees, were enacted against this historical backdrop. Bail Reform Act of 1984, Pub. L. 98–473, 98 Stat. 1976, 18 U. S. C. §§ 3142(e), (f). Congress carefully prescribed stringent procedures to govern this extraordinary departure from

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this country and . . . fraught with danger of excesses and injustice. . . .' *Williamson* v. *United States*, 95 L. Ed. 1379, 1382 (1950) (opinion in chambers) (footnote omitted)." *United States* v. *Salerno*, 481 U. S. 739, 766 (1987) (MARSHALL, J., dissenting).

The Bail Reform Act of 1984 added 18 U. S. C. § 3142(j): "Nothing in this section shall be construed as modifying or limiting the presumption of innocence."

[5] In limiting the construction of 18 U. S. C. § 3147, which prescribes punishment for crimes committed by persons on pretrial release, we recognized that balancing among various policy objectives was the job of Congress:

"[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates the legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987).

the guarantee of liberty normally accorded to presumptively innocent individuals.[6] Accordingly, when this Court upheld the constitutionality of these provisions of the Bail Reform Act, it assumed that pretrial detention would be imposed only on those arrestees "found after an adversary hearing to pose a threat . . . which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing." *United States* v. *Salerno*, 481 U. S. 739, 755 (1987).[7]

Section 3142(e) permits pretrial detention only "[i]f, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of

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[6] Both Houses of Congress were aware of the necessity of procedural protections:

"[T]he Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind." S. Rep. No. 98–225, p. 8 (1983).

"Several of the states which have recently enacted pretrial detention statutes have also incorporated elaborate due process protections. These procedures have been recommended by the American Bar Association, the Association of the Bar of the City of New York and the National Association of Pretrial Services Agencies." H. R. Rep. No. 98–1121, p. 14 (1984) (footnote omitted) (citing Wis. Const., Art. I, § 8(3) (limiting any legislation allowing pretrial detention to a maximum of 10 days without a hearing and 60 days thereafter)).

[7] The unique dangers posed by any detention provision were more fully described by JUSTICE MARSHALL in his dissenting opinion in *Salerno:*

"This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution." 481 U. S., at 755.

the person as required and the safety of any other person and the community." Subsection (f) in turn sets forth specific deadlines, chosen "in light of the fact that the defendant will be detained during such a continuance," S. Rep. No. 98–225, p. 22 (1983), within which a detention hearing must be held:

> "The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days." § 3142(f)(2).

There was no such hearing—or finding of good cause for continuance—when respondent was arrested on February 8, 1989, when he first appeared before a Northern District of Illinois Magistrate on February 10, or when the New Mexico Magistrate convened the parties on February 16. No court considered the basis of detention until February 21, after respondent had been incarcerated for 13 days.[8]

Congress' specification of the timing of detention hearings defines one boundary of the courts' power to order pretrial detention. "Because detention may be ordered under section 3142(e) only after a detention hearing pursuant to subsection (f), the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial." S. Rep. No. 98–225, at 20. The clear terms of the statute demand strict adherence. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20,

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[8] Even the statutory provision applicable to arrestees who are aliens, pretrial releasees, or parolees allows detention only "for a period of not more than ten days" after proper judicial determination. 18 U. S. C. § 3142(d). The Senate recognized that "a deprivation of liberty of up to ten days is a serious matter," but allowed the longer period "to give the government time to contact the appropriate court, probation, or parole official, or immigration official and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate." S. Rep. No. 98–225, at 17.

25–31 (1989) (holding notice and 60-day delay requirements mandatory conditions precedent to commencing suit under 42 U. S. C. § 6972); cf. *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56 (1982) (Fed. Rule App. Proc. 4(a)(4) stating that a premature notice "shall have no effect" is mandatory and jurisdictional).[9]

A federal prosecutor should have no difficulty comprehending the unequivocal terms of § 3142(f)(2) and complying with its deadlines by proceeding or obtaining a proper continuance at the arrestee's first appearance. The rare failure to meet the requirements of subsection (f) will mean only that the Government forfeits the opportunity to seek pretrial detention in that case. Because the provisions of § 3142(f)(2) are a prerequisite only for hearings to consider this particular form of pretrial action, the prosecutor still may seek any conditions of release that are "reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." § 3142(c)(1)(B)(xiv). The range of options—the sole safeguards that were available in cases prior to the creation of the special detention provisions in 1984—remain viable.

II

The Court, however, concludes that no adverse consequences should flow from the prosecutor's violation of this plain statutory command. Treating the case as comparable to an agency's failure to audit promptly a grant recipient's

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[9] It is unnecessary to determine whether the time provisions of § 3142 actually create a jurisdictional bar, see *Hallstrom*, 493 U. S., at 31, nor is the question of the effect of violations of other provisions of § 3142(f) before us. The Court itself recognizes the possibility that "some combination of procedural irregularities could render a detention hearing so flawed that it would not constitute 'a hearing pursuant to the provisions of subsection (f)' for purposes of § 3142(e)," although it fails to identify what standards it would design to replace those stated by Congress. *Ante*, at 717. See also *ante*, at 720 (suggesting that "accident[s] of noncompliance" and "errors" are excusable); *ante*, at 721 (suggesting that "other remedies may exist . . . for conduct that is aggravated or intentional").

use of federal funds, see *Brock* v. *Pierce County*, 476 U. S. 253 (1986), the Court concludes that there is no reason to penalize the public for a prosecutor's mistake. If a belated hearing eventually results in a determination that detention was justified, the error has been proved harmless. The Court apparently discards the possibility that the hearing might result in a determination that the arrestee is eligible for release—as the Magistrate so determined in this case—or that detention of any arrestee before establishing the legality of that intrusion on liberty could "affect substantial rights." 876 F. 2d 826, 829 (CA10 1989); Fed. Rule Crim. Proc. 52(a). A harmless-error analysis fails to appreciate the gravity of the deprivation of liberty that physical detention imposes and the reality that "[r]elief in this type of case must be speedy if it is to be effective." *Stack*, 342 U. S., at 4.

This casual treatment of official violations of law is disturbing in itself, but it is particularly troubling because it treats the pretrial detention statute as just another routine species of Government regulation of ordinary civilian affairs.[10] The Court asserts that the requirements of § 3142(f) are in the category of statutory requisitions that do not limit the power of Government officers. *Ante*, at 717–718 (citing *French* v. *Edwards*, 13 Wall. 506, 511 (1872)). But the *French* Court also identified, and in fact applied, the opposite characterization of the procedural requirements of the sheriff's sale there at issue. It held that laws "intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, . . . are not directory but mandatory," concluding that such requisitions "must be followed or the

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[10] The Court seems satisfied to allow detention to continue without any hearing at all, unless the arrestee demands the proceeding that is the prosecutor's duty to instigate. The implication that an arrestee—who may well have just met temporary counsel at the first appearance—should be responsible for divining the Government's intent to move for detention and for initiating a timely hearing under § 3142(f) is absurd.

acts done will be *invalid*. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." *Id.*, at 511 (emphasis added). The grant of power that Congress gave courts to assess and enforce pretrial detention under §§ 3142(e) and (f) is also of a mandatory nature.[11]

As Congress recognized, the magnitude of the injury inflicted by pretrial detention requires adherence to strict procedural safeguards that cannot be sacrificed in the name of community safety. While the Court regards any arrestee as "a person who presumptively should be detained under § 3142(e)" and as "a suspect certain to flee from justice," *ante*, at 717, 721, I believe—and the Act reflects—that a new arrestee is initially presumed eligible for release no matter how guilty a prosecutor may believe him to be. Section 3142(e) recognizes that certain characteristics of the offense or arrestee may support a rebuttable presumption that no conditions of release exist, but such a presumption arises only "*if* such judicial officer *finds*" that those conditions do exist. (Emphasis added.) The magistrate's say-so cannot make his reasoning any less of a bootstrap. A late detention hearing does not become permissible on the basis of a presumption that cannot exist until after the hearing is held.

III

Congress has written detailed legislation in a sensitive area that requires the Government to turn square corners. The Court today, however, permits federal prosecutors to violate

[11] The Court vigorously declines to "satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits," in the belief that compliance can be presumed "without the threat that we must embarrass the system by releasing a suspect certain to flee from justice." *Ante*, at 721. This analysis incorrectly assumes that the courts have discretion over such matters. *Congress* has "perceived" the need to ensure that detention hearings are held promptly and has shouldered the responsibility for any "embarrassment" by precisely defining the authority of courts to order pretrial detention.

the law with impunity. I agree with JUSTICE SCALIA's observation that strict compliance with such rules may appear to "frustrat[e] justice in the particular case," but

> "[w]ith technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State broke the rules here, and must abide by the result." *Jones* v. *Thomas*, 491 U. S. 376, 396 (1989) (dissenting opinion).

I respectfully dissent.

DEMOSTHENES ET AL. *v.* BAAL ET AL.

ON APPLICATION TO VACATE STAY

No. A–857. Decided June 3, 1990

Thomas Baal, after being examined by three psychiatrists who found him competent to stand trial, pleaded guilty to first-degree murder and robbery and was sentenced to death by a Nevada court. The State Supreme Court affirmed. Subsequently, he withdrew his request for state postconviction relief, testifying at an evidentiary hearing to determine his competency that he did not want to continue the proceedings and that he was aware of his impending execution and the reason for it. The court reviewed the psychiatrists' reports and other evidence and held that Baal was sane and had made an intelligent waiver of his right to pursue postconviction relief. A few hours before his scheduled execution, Baal's parents, applicants here, filed a petition for federal habeas corpus relief as his "next friend," contending that he was not competent to waive federal review. The District Court denied their application for a stay of execution, holding that it had no jurisdiction to entertain the petition. It found that, based on the record before the state court, Baal was legally competent, and it determined that a newly submitted affidavit by a nonexamining psychiatrist, which questioned Baal's competency, was conclusory and insufficient to warrant a psychiatric hearing or examination. The Court of Appeals reversed, ruling that applicants had made a minimum showing of Baal's incompetence warranting a basis for a full evidentiary hearing by the District Court.

Held: No adequate basis for the exercise of federal power exists. The prerequisite for "next friend" status—that the real party in interest be unable to litigate his own cause due to mental incapacity—has not been satisfied. The state court's factual conclusion that Baal had intelligently waived his right to pursue postconviction relief was fairly supported by the record and, thus, is binding on a federal habeas court, see *Maggio* v. *Fulford*, 462 U. S. 111. However, the Court of Appeals, rather than relying exclusively on the nonexamining psychiatrist's affidavit to show that Baal might have become incompetent since the state-court hearing, based its determination on the same evidence that had been before the state court. As there was no evidentiary basis for the Court of Appeals' conclusion that the District Court erred in declining to conduct an evidentiary hearing, the stay the court granted did not reflect the presence of substantial grounds upon which relief could be granted.

Stay vacated.

PER CURIAM.

The State of Nevada has moved to vacate an order of the Court of Appeals for the Ninth Circuit granting a stay of the execution of Thomas E. Baal. We grant the State's motion to vacate the stay.

I

Thomas E. Baal was convicted and sentenced to death in Nevada District Court for first-degree murder and robbery with use of a deadly weapon. Evidence indicated that after attempting to rob Frances P. Maves, Baal stabbed her numerous times, took her car, and fled. Maves was pronounced dead some hours later. Police officers arrested Baal in Reno on February 28, 1988. After being given his *Miranda* warnings, Baal confessed to the robbery and murder.

In March 1988, two psychiatrists examined Baal and found that Baal was competent to stand trial, able to understand right from wrong at the time of the alleged offense, and disturbed but not psychotic. In June 1988, Baal was arraigned and pleaded not guilty and not guilty by reason of insanity. A third psychiatrist, Dr. O'Gorman, was appointed to examine Baal, and, following an examination on August 31, 1988, concluded that Baal was competent to stand trial. On September 22, 1988, Baal pleaded guilty to first-degree murder and to robbery, both with use of a deadly weapon. A three-judge panel unanimously sentenced Baal to death. The Nevada Supreme Court affirmed Baal's conviction and sentence, rejecting Baal's contention that he was incompetent to enter a guilty plea and that it was error not to conduct a competency hearing prior to accepting his pleas. *Baal* v. *State*, 106 Nev. 69, 787 P. 2d 391 (1990).

Baal filed a petition for state postconviction relief, but, prior to the hearing, changed his mind and withdrew the petition. On May 24, 1990, the state postconviction court held an evidentiary hearing to determine Baal's competency. At that hearing, Baal testified that he did not want to continue

any postconviction proceedings. He further testified that he knew the date he would be put to death, the reason he would be put to death, and that his waiver of postconviction relief would result in his death. A state psychiatrist testified that Baal was competent; a state prison official who had observed Baal also testified as to Baal's competence. The court also reviewed the reports of three psychiatrists who had examined Baal and concluded that he was competent to stand trial. Based on this evidence, the court held that Baal was aware of his impending execution and of the reason for it, and thus was sane under the test set forth in *Ford* v. *Wainwright*, 477 U. S. 399 (1986). The court further held that Baal was in control of his faculties, was competent to choose to decline to pursue an appeal, and had made an intelligent waiver of his right to pursue postconviction relief.

Approximately one week later, on May 31, 1990, and hours before Baal's scheduled execution, Edwin and Doris Baal (Baal's parents) filed a petition for federal habeas corpus relief as "next friend" of Thomas E. Baal. As one of their grounds for relief, petitioners asserted: "Thomas Baal is not competent to waive federal review of his claims." In support of this claim, petitioners relied on an affidavit of a nonexamining psychiatrist, Dr. Jerry Howle, and an affidavit of Doris Baal.

The United States District Court conducted a hearing and denied petitioners' application for stay of execution, holding that, under this Court's recent decision in *Whitmore* v. *Arkansas*, *ante*, p. 149, petitioners had failed to establish that the court had jurisdiction to entertain the petition. According to the District Court, petitioners had not provided an adequate explanation of why Baal could not appear on his own behalf to prosecute this action. Upon review of the record, the court found that all the evidence, other than the newly submitted affidavit of Dr. Howle, established that Baal was legally competent to understand the nature and consequences of his act and to represent his own interests in these proceed-

ings. The court determined that Dr. Howle's affidavit was not based on a first-hand examination, was conclusory, and was insufficient to warrant a psychiatric hearing or additional psychiatric examinations of Baal. The court subsequently denied petitioners' motion for a certificate of probable cause. Petitioners appealed to the Court of Appeals for the Ninth Circuit.

A divided panel of the Court of Appeals granted petitioners' certificate of probable cause and stayed Thomas Baal's execution. That court held that petitioners had made "some minimum showing of [Baal's] incompetence" and evidence in the record provided "at least an arguable basis for finding that a full evidentiary hearing on competence should have been held by the district court." Order in *Baal* v. *Godinez*, No. 90–15716 (CA9, June 2, 1990), pp. 3, 5. Judge Kozinski, in dissent, asserted that there was no substantial evidence of Baal's incompetence to warrant a further evidentiary hearing or to upset the Nevada District Court's finding that Baal was competent, which is entitled to a presumption of correctness upon federal habeas review. Dissent, at 6, 7.

II

In *Whitmore* v. *Arkansas*, *ante*, at 165, we held that "one necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity." See also *Rosenberg* v. *United States*, 346 U. S. 273, 291 (1953). This prerequisite is not satisfied "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed." *Whitmore*, *ante*, at 165. In *Whitmore*, we relied on the competency findings made by the Arkansas Supreme Court and concluded that Whitmore lacked next-friend standing in federal court. *Ante*, at 165–166. In this case, the state court held such an evidentiary hearing just one week before petitioners brought this petition for habeas corpus.

After reviewing the evidence and questioning Baal, the state court concluded that Baal had intelligently waived his right to pursue postconviction relief.

A state court's determinations on the merits of a factual issue are entitled to a presumption of correctness on federal habeas review. A federal court may not overturn such determinations unless it concludes that they are not "fairly supported by the record." See 28 U. S. C. §2254(d)(8). We have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption. *Maggio* v. *Fulford*, 462 U. S. 111, 117 (1983). In this case, the state court's conclusion that Baal was competent to waive his right to further proceedings was "fairly supported by the record." Three psychiatrists who examined Baal had determined he was competent; a psychiatrist who had the opportunity to observe and talk to Baal testified that Baal was competent at the hearing; and the trial court concluded that Baal was competent after both observing Baal and questioning him extensively on the record. Accordingly, under §2254(d)'s presumption of correctness, the state court's factual finding as to Baal's competence is binding on a federal habeas court. See *Maggio* v. *Fulford*, *supra;* see also *Marshall* v. *Lonberger*, 459 U. S. 422 (1983) (§2254(d)'s presumption of correctness required federal habeas court to accept state court's factual findings on the issue of respondent's credibility).

The state evidentiary hearing took place on May 24, 1990. When petitioners filed their habeas petition in District Court the following week, on May 31, 1990, the only new evidence presented to the court was the affidavit of Dr. Jerry Howle, a psychiatrist who had not examined Baal. In the affidavit, Dr. Howle stated that he had examined the reports of the psychiatrists who had found Baal competent to stand trial and a 1987 admission, evaluation, and discharge summary from the Hawaii State Hospital. Dr. Howle did not directly assert that Baal was incompetent. Rather, based only on

these reports, and without any opportunity personally to observe Baal, the doctor concluded that "there is reason to believe this person *may not be competent* to waive his legal remedies." Petition for Habeas Corpus in *Baal* v. *Godinez*, No. 90–243 (D. Nev.), Exhibit D (emphasis added). Cf. *Rees* v. *Peyton*, 384 U. S. 312, 313 (1966) (District Court directed to make a judicial determination of petitioner's competence after psychiatrist examined him and "filed a detailed report concluding that [petitioner] was mentally incompetent"). As the District Court determined, this affidavit is "conclusory and lacking sufficient foundation or substance to warrant either a psychiatric hearing or additional psychiatric examination of the defendant." Order in *Baal* v. *Godinez*, No. CV-N-90–243-HDM (D. Nev., May 31, 1990), p. 3. The District Court also reviewed the state-court record and the transcript of the state-court proceeding, as well as speaking with Baal at length via telephone. Based on its review, it concluded that petitioners had failed to establish that Baal was not competent to waive further proceedings. In the absence of any "meaningful evidence" of incompetency, *Whitmore* v. *Arkansas*, *ante*, at 166, the District Court correctly denied petitioners' motion for a further evidentiary hearing on the question of Baal's competence to waive his right to proceed.

In holding that there was a "basis for finding that a full evidentiary hearing on competence should have been held," Order in *Baal* v. *Godinez*, No. 90–15716 (CA9, June 2, 1990), p. 5, the Court of Appeals did not rely exclusively on the affidavit of Dr. Howle, the only evidence offered to indicate that Baal might have become incompetent at some time after the State's evidentiary hearing. That affidavit, as noted, was not based on personal examination of Baal and stated only in conclusory and equivocal fashion that, based on his evaluation of the reports of the examining psychiatrists, Baal "may not be competent." Rather, the Court of Appeals based its determination on the same evidence that had been before the

State District Court—the reports of the three psychiatrists, the hospital report, and testimony regarding Baal's prior suicide attempts. Indeed, because the Court of Appeals did not personally observe Baal, as the state court did, it had even less reason to overturn what is essentially a factual determination. See *Maggio* v. *Fulford*, *supra*, at 113. As there was no evidentiary basis for the Court of Appeal's conclusion that the District Court erred in declining to conduct an evidentiary hearing, the stay granted by the court did not "reflect the presence of substantial grounds upon which relief might be granted." *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983).

We realize that last minute petitions from parents of death row inmates may often be viewed sympathetically. But federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention. Accordingly, we grant the State's motion to vacate the stay entered by the Court of Appeals.

It is so ordered.

JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would deny the application to vacate the stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today vacates a stay of execution that the United States Court of Appeals for the Ninth Circuit had entered so that it might consider the case in an orderly fashion. For the second time within the span of only a few weeks, this Court has seen fit to interfere with the administration of justice by the lower federal courts by vacating a stay issued in the sound discretion of judges who are much

more familiar with the cases than we are. See *Delo* v. *Stokes*, *ante*, p. 320. I find this development unfortunate and distressing.

I

The Court's action in the instant case is particularly unwise. The Court of Appeals issued the stay so that it could consider Mr. Baal's first federal habeas petition, filed on his behalf by his parents in their capacity as next friends. It is wholly inappropriate to deny the court an opportunity to consider the case at such an early stage of the collateral review process. As even the Judicial Conference's recent proposal for streamlined review in capital cases acknowledges, a prisoner is entitled at a minimum to "one complete and fair course of collateral review in the state and federal system, *free from the time pressure of impending execution.*" Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6 (Aug. 1989) (emphasis added).

The Court recognizes that this case requires application of our recent decision in *Whitmore* v. *Arkansas*, *ante*, p. 149, which held that "a 'next friend' must provide an adequate explanation—such as . . . mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action." *Ante*, at 163. In the instant case, the members of Mr. Baal's family allege that he is not competent to waive federal review of his claims, and they seek a hearing to resolve that question. The Ninth Circuit granted a stay to examine their claim. Whether their arguments are persuasive to us is not the issue; the question is whether the Ninth Circuit abused its discretion in granting a stay to enable it to reflect on the family's contentions and digest the record in a methodical and unhurried manner.

I do not believe that this decision can be characterized as an abuse of discretion, especially since the Ninth Circuit has set an expedited briefing and hearing schedule. The Court of Appeals has merely issued a certificate of probable cause

to appeal; it has not ruled on the merits of Baal's competency or even on the question of whether an evidentiary hearing is required to determine whether Baal is competent. Rather, it has held merely that Mr. Baal's family has made a "'substantial showing of the denial of [a] federal right.'" *Barefoot* v. *Estelle*, 463 U. S. 880, 893 (1983) (citation omitted). The Court of Appeals may yet rule that Mr. Baal's family has not pleaded facts sufficient to warrant an evidentiary hearing. The Court of Appeals has found only that "the issu[e] [is] debatable among jurists of reason; that a court *could* resolve the issu[e] [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.*, at 893, n. 4 (citation omitted).

In vacating the stay, this Court has decided quite precipitately that Mr. Baal's family has failed even to allege sufficient facts to require an evidentiary hearing regarding his competence. A federal court has the power to conduct an evidentiary hearing to resolve disputed facts if it determines that a petitioner's allegations, if proved true, would entitle him to relief under the appropriate legal standard. See *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963). Assuming that the standard for competence to waive federal habeas corpus review of a death sentence is the same as that announced in *Rees* v. *Peyton*, 384 U. S. 312, 314 (1966), the question is whether Mr. Baal's family alleged sufficient facts to show that Mr. Baal

> "has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further ligitation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

In an order released only a few hours ago, the Ninth Circuit summarized the evidence warranting further inquiry into the question of Mr. Baal's competence:

"Although the record contains three opinions by psychiatrists who found Baal competent in 1988 to stand trial, assist his attorneys, and understand the charges against him, the record also reveals that Baal has been hospitalized for behavioral and mental problems on numerous occasions since he was fourteen years old, has attempted suicide on at least four occasions since 1987, and has been diagnosed in the past as a latent schizophrenic, a borderline personality, depressed, and as suffering from organic brain syndrome. And although Dr. Jurasky declared him competent in March, 1988 to understand the charges against him, Dr. Jurasky described him as a 'seriously and dangerously disturbed person' whose judgment 'is considered impulsive with strong antisocial tendencies.'

"In addition, petitioners presented to the district court an affidavit by board-certified psychiatrist Jerry Howle stating that, based on the reports that he reviewed, 'there is reason to believe [Baal] may not be competent to waive his legal remedies.' . . . This evidence, combined with the fact that Baal has changed his mind in the past after having decided to waive his legal remedies, and has attempted suicide twice in April of this year, provides at least an arguable basis for finding that a full evidentiary hearing on competence should have been held by the district court." Order in *Baal* v. *Godinez*, No. 90–15716 (June 2, 1990), pp. 4–5 (footnote omitted).

The Court can reach the conclusion it does today only by, in effect, holding an evidentiary hearing in advance and resolving these complex factual issues on its own.

The fact that a state court held an evidentiary hearing one week ago and determined that Mr. Baal was competent offers no support for the Court's action today. *Maggio* v. *Fulford*, 462 U. S. 111 (1983), on which the Court relies, is consistent with the view that the question of competence is ultimately a legal issue. See *id.*, at 117; *id.*, at 119 (WHITE, J., concur-

ring in judgment). A state court's determination of subsidiary facts may enjoy a presumption of correctness in whatever federal hearing is held. This does not answer the antecedent question, however, whether an evidentiary hearing in federal court is warranted on the basis of the factual *allegations* made in the federal habeas petition. In addition, of course, the state court's findings would receive deference only if the state hearing provided a full and fair opportunity for resolution of the issue. See 28 U. S. C. §2254(d). Because the proceedings in this case have been so hurried, it is not at all clear that the state hearing was "full and fair" and that the findings are supported by the record.

II

Even apart from the posture of the instant case, I would deny the application to vacate the stay entered by the Court of Appeals. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

Reporter's Note

The next page is purposely numbered 901. The numbers between 741 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR APRIL 23 THROUGH JUNE 3, 1990

APRIL 23, 1990

Certiorari Granted—Vacated and Remanded

No. 89-804. MINNESOTA *v.* HERSHBERGER ET AL. Sup. Ct. Minn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Employment Div., Oregon Dept. of Human Resources* v. *Smith*, 494 U. S. 872 (1990). JUSTICE STEVENS and JUSTICE O'CONNOR dissent. Reported below: 444 N. W. 2d 282.

Miscellaneous Orders

No. — — ——. IN RE MARTIN. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. — — ——. MOORE ET AL. *v.* CARR ET AL. Motion to direct the Clerk to file application for an extension of time and petition for writ of certiorari out of time denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees granted, and the River Master is awarded $1,215.00 for the period January 1 through March 31, 1990, to be paid equally by the parties. [For earlier decision herein, see, *e. g.*, 494 U. S. 111.]

No. D-857. IN RE DISBARMENT OF KAY. Disbarment entered. [For earlier order herein, see 493 U. S. 1066.]

No. D-859. IN RE DISBARMENT OF DAWES. Kenneth J. Dawes, Jr., of Trenton, N. J., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 20, 1990 [493 U. S. 1067], is hereby discharged.

No. D-893. IN RE DISBARMENT OF AULVIN. It is ordered that John Lewis Aulvin, of Mount Carmel, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–894. IN RE DISBARMENT OF OSTROWSKY. It is ordered that Bernard Herbert Ostrowsky, of Skokie, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–895. IN RE DISBARMENT OF DINEFF. It is ordered that Louis Carl Dineff, of Summit, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–896. IN RE DISBARMENT OF JOHNSON. It is ordered that Charles B. Johnson, of Pasadena, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–897. IN RE DISBARMENT OF HERSH. It is ordered that Alan Mark Hersh, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–839. ARIZONA *v.* FULMINANTE. Sup. Ct. Ariz. [Certiorari granted, 494 U. S. 1055.] Motion for appointment of counsel granted, and it is ordered that Stephen R. Collins, Esq., of Phoenix, Ariz., be appointed to serve as counsel for respondent in this case.

No. 89–1167. BRUTSCHE *v.* CLEVELAND-PERDUE, SUCCESSOR REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF JONES. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–1361. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* WOLLERSHEIM. Ct. App. Cal., 2d App. Dist. Motion of National Council of Churches of Christ in the U. S. A. et al. for leave to file a brief as *amici curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 89–1434. UNITED STATES *v.* HAGGERTY ET AL. D. C. W. D. Wash. [Probable jurisdiction noted, 494 U. S. 1063.] Motion of appellee Darius Strong for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel

granted, and it is ordered that Charles S. Hamilton III, Esq., of Seattle, Wash., be appointed to serve as counsel for appellee Darius Strong in this case for the purpose of filing a brief.

No. 89-6868. NOWAK *v.* TREZEVANT. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 14, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89-6840. IN RE HENDERSON. Petition for writ of prohibition denied.

Certiorari Granted

No. 87-6796. FORD *v.* GEORGIA. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 257 Ga. 661, 362 S. E. 2d 764.

No. 89-1363. UNITED STATES *v.* FRANCE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 886 F. 2d 223.

No. 89-1448. VIRGINIA BANKSHARES, INC., ET AL. *v.* SANDBERG ET AL. C. A. 4th Cir. Motions of American Corporate Counsel Association and American Bankers Association et al. for leave to file briefs as *amici curiae* granted. Motion of American Bankers Association et al. for leave to file an amended brief as *amici curiae* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 891 F. 2d 1112.

No. 89-5916. DEMAREST *v.* MANSPEAKER ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 884 F. 2d 1343.

No. 89-6332. MINNICK *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 551 So. 2d 77.

Certiorari Denied

No. 89–915. TENNESSEE *v.* CAUTHERN. Sup. Ct. Tenn. Certiorari denied. Reported below: 778 S. W. 2d 39.

No. 89–960. TIDELAND WELDING SERVICE ET AL. *v.* SAWYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 157.

No. 89–1212. DAVIS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 271.

No. 89–1223. INDEPENDENT U. S. TANKER OWNERS COMMITTEE ET AL. *v.* SKINNER, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 148, 884 F. 2d 587.

No. 89–1228. LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 28.

No. 89–1311. CARBAUGH, COMMISSIONER, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES OF VIRGINIA *v.* TELCO COMMUNICATIONS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 1225.

No. 89–1375. BP EXPLORATION (ALASKA) INC. ET AL. *v.* BAILY, ATTORNEY GENERAL OF ALASKA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 624.

No. 89–1376. POLYAK *v.* HULEN ET AL.; POLYAK *v.* HULEN ET AL.; POLYAK *v.* HAMILTON; and POLYAK *v.* BUFORD EVANS & SONS. C. A. 6th Cir. Certiorari denied. Reported below: 890 F. 2d 416 (first, third, and fourth cases); 891 F. 2d 290 (second case).

No. 89–1379. ALSTON ET AL. *v.* GENERAL MOTORS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 287.

No. 89–1381. ENDRESS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 1244.

No. 89–1384. ROSS ET AL. *v.* BANK SOUTH, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 723.

No. 89–1386. FISHMAN *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 771 S. W. 2d 573.

No. 89–1388. SCOTT *v.* DREAMLITE HOLDINGS LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 890 F. 2d 1147.

No. 89–1406. NEISTEIN *v.* ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 132 Ill. 2d 104, 547 N. E. 2d 198.

No. 89–1407. DAVIS, BY AND THROUGH HER GUARDIAN, FARMERS BANK & CAPITAL TRUST COMPANY OF FRANKFORT, KENTUCKY *v.* KENTUCKY FINANCE COMPANIES RETIREMENT PLAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 689.

No. 89–1424. CROUCH *v.* MCINTYRE. Ct. App. Ore. Certiorari denied. Reported below: 98 Ore. App. 462, 780 P. 2d 239.

No. 89–1449. HOLMAN ET AL. *v.* WALLING. C. A. 2d Cir. Certiorari denied.

No. 89–1457. LIMONJA ET AL. *v.* VIRGINIA. Ct. App. Va. Certiorari denied. Reported below: 8 Va. App. 532, 383 S. E. 2d 476.

No. 89–1465. KOZAK *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 277.

No. 89–1475. SILVA ET AL. *v.* MACLAINE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1392.

No. 89–1509. WAGNER *v.* UNITED STATES BANKRUPTCY COURT. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89–1521. LACKEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 403.

No. 89–1528. CRUTCHFIELD *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 318 Md. 200, 567 A. 2d 449.

No. 89–1537. SOLOMON *v.* HILL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1410.

No. 89–5985. DIERBECK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 54 Wash. App. 1021.

No. 89–6205. MORTON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89–6274. OLSEN *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 279 U. S. App. D. C. 1, 878 F. 2d 1458.

No. 89–6303. PAIGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 998.

No. 89–6313. CHAPOTEAU ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 375.

No. 89–6426. CARTIER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 2d 524, 539 N. Y. S. 2d 804.

No. 89–6512. DUPREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 303.

No. 89–6523. EATON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 890 F. 2d 511.

No. 89–6546. BUZARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 475.

No. 89–6760. JAYME *v.* BOARD OF VETERANS APPEALS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 281.

No. 89–6777. BELL *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 405.

No. 89–6801. CRANE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 89–6804. SCHAENING *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 89–6819. MENEFIELD *v.* ROWLAND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 295.

No. 89-6823. WILLIAMS *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 891 F. 2d 299.

No. 89-6824. TELK *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6825. VINJE-MORPURGO *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-6826. SIMON *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 890.

No. 89-6828. ROTMAN *v.* WORCESTER POLICE DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1325.

No. 89-6831. FREEMAN ET AL. *v.* CITY OF LAGRANGE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 825.

No. 89-6834. CASSELL *v.* GINGRICH ET AL. (two cases). Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 11, 564 A. 2d 1249 (first case); 523 Pa. 12, 564 A. 2d 1250 (second case).

No. 89-6836. JOHNSON *v.* BAXLEY, ASSISTANT DEFENDER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 865.

No. 89-6842. KUCHER *v.* MASSACHUSETTS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1326.

No. 89-6844. BRENNAN *v.* BRENNAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 890 F. 2d 416.

No. 89-6850. LEPISCOPO *v.* JIMENEZ-MAES ET AL. Sup. Ct. N. M. Certiorari denied.

No. 89-6853. DUROSKO *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 882 F. 2d 357.

No. 89-6854. SANFORD *v.* ALAMEDA-CONTRA COSTA TRANSIT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 1394.

No. 89-6861. JONES *v.* CITY OF HAMTRAMCK ET AL. C. A. 6th Cir. Certiorari denied.

No. 89-6862. SAKOVICH *v.* PANDYA. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1174, 549 N. E. 2d 360.

No. 89-6863. BARNETT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1022.

No. 89-6873. CASTRO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6879. BARBELLA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 154 App. Div. 2d 687, 546 N. Y. S. 2d 675.

No. 89-6884. BUSCH *v.* OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 124 Pa. Commw. 411, 556 A. 2d 500.

No. 89-6894. JUSTICE *v.* REDA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 291.

No. 89-6895. HOLSEY *v.* CAUFFMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 865.

No. 89-6908. DAVIS *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89-6936. BAKER *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1410.

No. 89-6940. BRYANT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6962. ZANZUCCHI *v.* WEINBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1097.

No. 89-6975. PEOPLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89-6977. AZURE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1343.

No. 89-6983. OBABUEKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 871.

No. 89-6984. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 408.

No. 89-6999. SHAID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 1163.

No. 89-7001. DIAZ *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 521.

No. 89-7002. CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 410.

No. 89-7004. MARTINEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 89-7006. SIERRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 525.

No. 89-7018. MCMILLION *v.* ROLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-7019. MUNOZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 292.

No. 89-7021. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89-7027. BRADLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 634.

No. 89-7034. COLEMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 255, 893 F. 2d 1404.

No. 89-7040. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 521.

No. 89-7041. MONTOYA-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 839.

No. 89-7042. JAWORSKI *v.* YOUNG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 1318.

No. 89-7050. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 996.

No. 89–7055. BEIERLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 410.

No. 89–7065. MAINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89–794. MCCAMBRIDGE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 778 S. W. 2d 70.

No. 89–1079. PPG INDUSTRIES, INC. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 5th Cir. Motion of Society of the Plastics Industry, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 870 F. 2d 177 and 885 F. 2d 253.

No. 89–1084. DASILVA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 887 F. 2d 375.

No. 89–1164. GENERAL MOTORS CORP. *v.* CARLSON ET AL. C. A. 4th Cir. Motion of Motor Vehicle Manufacturers Association of the United States Inc. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 883 F. 2d 287.

No. 89–1197. CITY OF ST. GEORGE, UTAH *v.* FOREMASTER. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 882 F. 2d 1485.

No. 89–1336. RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* SPAIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 883 F. 2d 712.

No. 89–1367. WOLLERSHEIM *v.* CHURCH OF SCIENTOLOGY OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 212 Cal. App. 3d 872, 260 Cal. Rptr. 331.

No. 89–1401. EXXON CORP. *v.* WYOMING STATE BOARD OF EQUALIZATION. Sup. Ct. Wyo. Motions of Committee on State Taxation of the Council of State Chambers of Commerce and Institute of Property Taxation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 783 P. 2d 685.

No. 89-5222. FORTENBERRY *v.* ALABAMA. Sup. Ct. Ala.;
No. 89-6431. MORRISON *v.* ALABAMA. Ct. Crim. App. Ala.; and
No. 89-6765. CARRERA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 89-5222, 545 So. 2d 145; No. 89-6431, 551 So. 2d 435; No. 89-6765, 49 Cal. 3d 291, 777 P. 2d 121.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89-6679. SWINDLER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 2d 1342.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

A defendant's interest in a fundamentally fair trial outweighs the State's interest in trying the defendant in a particular venue. See, *e. g.*, *Lee* v. *Georgia*, 488 U. S. 879 (1988) (MARSHALL, J., dissenting from denial of certiorari). Accordingly, state laws that restrict a court's ability to protect a defendant from the possibility of juror exposure to prejudicial publicity unconstitutionally infringe on a defendant's right to a fair and impartial jury. Relying in part on its interpretation of Arkansas law, see Ark. Code Ann. § 16-88-207 (1987) ("In no case shall a second removal of the same cause be allowed"), the trial court in this capital case refused to allow petitioner a second change of venue. I would grant the petition for certiorari to provide much needed guidance regarding the minimal due process requirements for state change of venue rules. When, as here, a State frames its venue rule in absolute terms and fails to permit the trial court to consider a particular defendant's right to a jury free from preconceptions regarding his guilt, such a rule violates due process. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 352 (1966) ("'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a

procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process'") (quoting *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965)). Even if I did not believe that this case merited plenary review, I would grant the petition for writ of certiorari and vacate the death penalty, because I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting).

Petitioner was convicted of murdering a police officer and sentenced to death. His conviction was reversed by the Arkansas Supreme Court because of the trial court's failure to grant a change of venue from Sebastian County, where the killing occurred. *Swindler* v. *State*, 264 Ark. 107, 113, 569 S. W. 2d 120, 123 (1978). Petitioner was thereafter retried in Scott County, a small rural county adjacent to Sebastian. Waldron, the seat of Scott County, is only 45 miles south of Fort Smith, the location of both the crime and the first trial.

During *voir dire*, a majority of the 120 venirepersons indicated that they were aware that petitioner had previously been found guilty of the crime and that he was wanted in another State for allegedly murdering two teenagers. More importantly, an overwhelming majority of the venire—98 out of 120—either tentatively or firmly believed that petitioner was guilty. The strong local feelings regarding petitioner's guilt are reflected in the comments of venireperson Thomas Bricksey:

> "Q. [H]ave you discussed this case with anybody?
> "A. Oh, yes, sir.
> "Q. All right, and have these people expressed an opinion to you about this case?
> "A. Yes, sir.
> "Q. Could you tell me what those opinions were? Did they think the defendant was guilty?
> "A. I am afraid it was almost unanimous.
> "Q. Did you ever hear anybody state that they thought he was not guilty?
> "A. No sir." Tr. 1299.

Similar prejudicial attitudes surfaced in the *voir dire* of three other jurors whom petitioner challenged for cause but who, unlike

Bricksey, ultimately served on petitioner's jury. Each indicated that he believed petitioner was guilty as a result of exposure to pretrial publicity regarding petitioner's first trial. One of the jurors, Thurman Jones, when asked whether he accepted the principle that a person is innocent until proved guilty, replied, "I do, and I would accept it more if he had not been tried. The only thing I am wondering about now, since he has had a trial, and I know about it, I am wondering if he is not going to have to prove to me that he is innocent." Tr. 1149. Milton Staggs, another juror challenged by petitioner, when asked whether he had an opinion about the first verdict, stated, "Well, sure, based on what came out, I don't know how it could be otherwise, you know." Tr. 1223. Henry Sunderman, asked whether "you feel like because [the first jury] came to that conclusion that the defendant may well be guilty," replied "I would say yes." Tr. 979. The trial court, finding that each of the three challenged jurors was capable of setting aside his opinion regarding petitioner's guilt, denied petitioner's request that they be struck for cause.

During the five days of *voir dire*, petitioner requested a change of venue on several occasions. The trial court denied the motions, relying in part on the Arkansas venue statute, § 16–88–207. Tr. 878–879, 1407–1408, 1560. At other points, the trial judge rejected the venue change in apparent reliance on "the fact that [petitioner] still ha[d peremptory] challenges left," Tr. 1075, although petitioner exhausted his challenges before the entire jury was seated. At the close of jury selection, petitioner moved for a mistrial on the ground that the state statute prohibiting a second change of venue unconstitutionally deprived him of a fair and impartial jury. The trial court conceded that "it is quite obvious that this case has received great amounts of publicity, and [that] it is very difficult to find a juror, not only [in] Sebastian County but apparently throughout this part of even the western part of Arkansas, who have *[sic]* not read, heard or seen a great deal about it." Tr. 1559. The court nonetheless denied the motion on the basis of "the present Arkansas law and the record that was made" during jury selection. Tr. 1560.

Petitioner filed a petition for habeas corpus. The District Court denied relief and the Court of Appeals for the Eighth Circuit affirmed, rejecting petitioner's claim that his constitutional right to a fair and impartial jury was compromised by the trial court's refusal to change venue or to strike for cause jurors Jones,

Staggs, and Sunderman. 885 F. 2d 1342, 1347–1350 (1989). The court afforded a "presumption of correctness" to the state-court findings regarding the ability of jurors to set aside whatever prejudice they harbored against petitioner. *Id.*, at 1347. The court also relied on Eighth Circuit precedent, *Simmons* v. *Lockhart*, 814 F. 2d 504 (1987), in which the court had stated that "the fact that a venire panel is well informed on reported news is not by itself prejudicial." *Id.*, at 510. Lastly, the court rejected petitioner's constitutional challenge to Arkansas' change of venue rule because "the trial court based its denial of a second change of venue on the fact that Swindler had not established prejudice resulting from pretrial publicity." 885 F. 2d, at 1347.

We have yet to address squarely the constitutionality of state change of venue rules that limit a trial court's ability to protect a defendant from the effects of prejudicial publicity.* Here, the Court of Appeals attempted to avoid the constitutional question by relying on the trial court's finding that the empaneled jury was not unduly prejudiced. But the Court of Appeals failed to consider the extent to which the Arkansas rule affected the trial court's assessment of prejudice. The transcript makes clear that the Arkansas rule was a strong factor in the trial court's decision and that the court had difficulty separating its merits judgment from its fear that a transfer of venue to another county "would cause a serious jurisdictional problem" under Arkansas law. Tr. 1560.

The state court's refusal to transfer venue may have been substantially affected by Arkansas' venue rule. When, on the basis of such rules, a court fails to protect the defendant from a trial that may be "but a hollow formality," *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963), this Court has a special obligation to consider their constitutionality and to specify the due process constraints on their application. I dissent.

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*The fact that petitioner's claim in this case arises on a federal petition for habeas corpus does not bar its consideration. Cf. *Teague* v. *Lane*, 489 U. S. 288 (1989). Assuming that the rule sought by petitioner is "new," it also falls within the category of "procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.*, at 313. The likelihood of an accurate conviction is no doubt diminished when a defendant is tried by a jury that has prejudged his case.

Rehearing Denied

No. 88–6677. BUTLER *v.* MCKELLAR, WARDEN, ET AL., 494 U. S. 407;

No. 89–1122. CHRISTENSEN *v.* PETTEY ET AL., 494 U. S. 1017;

No. 89–1126. SUEHL ET AL. *v.* IOWA, 494 U. S. 1017;

No. 89–6261. LAWSON *v.* CALIFORNIA, 493 U. S. 1086;

No. 89–6458. MACGUIRE *v.* MILLER, SHINE & BRYAN ET AL., 494 U. S. 1019; and

No. 89–6556. MCCONE *v.* SAGEBRUSH PROPERTIES, INC., ET AL., 494 U. S. 1035. Petitions for rehearing denied.

No. 88–1650. TAFFLIN ET AL. *v.* LEVITT ET AL., 493 U. S. 455. Second motion for leave to file petition for rehearing denied.

No. 89–1068. ROSENBAUM *v.* ROSENBAUM ET AL., 494 U. S. 1004. Application to suspend the effect of the order denying certiorari, addressed to JUSTICE O'CONNOR and referred to the Court, denied. Petition for rehearing denied.

APRIL 26, 1990

Miscellaneous Order

No. A–748. WOOMER *v.* AIKEN, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

Rehearing Denied

No. 88–6393 (A–749). WOOMER *v.* AIKEN, WARDEN, ET AL., 489 U. S. 1091 and 490 U. S. 1077. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion for leave to file second petition for rehearing denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application for stay of execution.

APRIL 27, 1990

Miscellaneous Order

No. A–754 (89–5167). TAFERO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 494 U. S. 1090. Application to suspend the effect of the order denying certiorari, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

APRIL 30, 1990

Appeal Dismissed

No. 89–6976. KLEIN *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 400 Mass. 309, 509 N. E. 2d 265.

Certiorari Granted—Vacated and Remanded

No. 89–5297. HILL *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Wells*, *ante*, p. 1. Reported below: 878 F. 2d 1436.

No. 89–5446. KORDOSKY *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *Wells*, *ante*, p. 1. Reported below: 878 F. 2d 991.

No. 89–6903. SMITH *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina*, 494 U. S. 433 (1990), and *Boyde* v. *California*, 494 U. S. 370 (1990). Reported below: 781 S. W. 2d 761.

Miscellaneous Orders

No. ———. BROWN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. — — ——. MATHIS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. — — ——. LIGHTFOOT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–700. KULALANI LTD. ET AL. *v.* COREY. C. A. 9th Cir. Application for recall and stay of mandate, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–747 (89–7307). CALLINS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 89–1104. ALCAN FOIL PRODUCTS DIVISION OF ALCAN ALUMINUM CORP. *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner to strike Brief for United States granted.

No. 89–1322. OKLAHOMA TAX COMMISSION *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA. C. A. 10th Cir.; and

No. 89–1435. AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSN. ET AL. *v.* SOO LINE RAILROAD CO. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–1433. UNITED STATES *v.* EICHMAN ET AL. D. C. D. C. [Probable jurisdiction noted, 494 U. S. 1063]; and

No. 89–1434. UNITED STATES *v.* HAGGERTY ET AL. D. C. W. D. Wash. [Probable jurisdiction noted, 494 U. S. 1063.] Motion of appellees for divided argument denied. Motion of appellees Eichman, Blalock, Tyler, Haggerty, Garza, and Campbell for leave to proceed further herein *in forma pauperis* granted.

No. 89–7105. IN RE GREEN. Petition for writ of habeas corpus denied.

No. 89–1220. IN RE VAN SANT;
No. 89–6731. IN RE FELDMAN; and
No. 89–6874. IN RE FELDMAN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 89–1149. GROGAN ET AL. *v.* GARNER. C. A. 8th Cir. Certiorari granted. Reported below: 881 F. 2d 579.

Certiorari Denied. (See also No. 89–6976, *supra.*)

No. 88–1564. JUDGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 1144.

No. 88–7446. FORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1231.

No. 89–1082. JONES HIRSCH CONNORS & BULL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–1172. GOLDHOFER FAHRZEUGWERK GMBH & CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 885 F. 2d 858.

No. 89–1201. TOLLEFSON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 239 Mont. 305, 780 P. 2d 621.

No. 89–1242. ABORTION RIGHTS MOBILIZATION, INC., ET AL. *v.* UNITED STATES CATHOLIC CONFERENCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 885 F. 2d 1020.

No. 89–1255. NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 443.

No. 89–1265. CAPOZZI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 883 F. 2d 608.

No. 89–1275. O'GRADY ET VIR *v.* OBERHAND ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–1316. BEHAGEN *v.* USA BASKETBALL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 884 F. 2d 524.

No. 89–1324. GANNETT CO., INC. *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 567 A. 2d 420.

No. 89–1402. HEIFNER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89–1404. CAMERON ET UX. *v.* BEELER, SCHAD & DIAMOND, P. C. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 1338.

No. 89–1411. TINDALL *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 550 So. 2d 449.

No. 89–1414. HOWELL *v.* MAUZY ET AL. Sup. Ct. Tex. Certiorari denied.

No. 89–1418. ILLINOIS CORPORATE TRAVEL, INC., DBA MCTRAVEL TRAVEL SERVICES *v.* AMERICAN AIRLINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 889 F. 2d 751.

No. 89–1431. MYERS *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied.

No. 89–1432. JACKSON *v.* JOHNSTOWN/CONSOLIDATED REALTY TRUST ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 185 Ill. App. 3d 734, 542 N. E. 2d 30.

No. 89–1437. SUTHERLAND ET AL. *v.* HOLCOMBE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89–1440. KNOX COUNTY, TENNESSEE, ET AL. *v.* MCWHERTER, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1287.

No. 89–1446. AHTNA, INC. *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 1401.

No. 89–1447. IDECO DIVISION OF DRESSER INDUSTRIES, INC. *v.* CROCKER NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1452.

No. 89–1466. RYAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 547, 568 A. 2d 179.

No. 89–1487. DUNLAP *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–1496. GILLIAM *v.* NATIONAL COMMISSION ON CERTIFICATION OF PHYSICIAN ASSISTANTS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 140.

No. 89–1535. CASTRO ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89–1540. AMES *v.* SUMMEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 1041.

No. 89–6500. BOUDREAU *v.* COLLINS, SUPERINTENDENT, MOORE CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 864.

No. 89–6525. REYNOLDS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 778 S. W. 2d 661.

No. 89–6565. FRY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 94 N. C. App. 390, 381 S. E. 2d 205.

No. 89–6646. MUNSTER-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 1267.

No. 89–6719. BRUNO *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6783. HARRISON *v.* ROLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 890 F. 2d 676.

No. 89–6839. IN RE MARTIN. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 522.

No. 89–6851. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 89–6877. TAYLOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89–6880. CONLEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 89–6897. SEVILLA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 132 Ill. 2d 113, 547 N. E. 2d 117.

No. 89–6898. WOODS *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 891 F. 2d 196.

No. 89-6901. DOWELL *v.* LENSING, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89-6902. COLEMAN *v.* DELAWARE. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 279.

No. 89-6904. CONLEY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 89-6905. HOLLEY *v.* EDWARDS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 865.

No. 89-6907. GALOWSKI *v.* MURPHY, SUPERINTENDENT, COLUMBIA CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 2d 629.

No. 89-6909. CARTER *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 521.

No. 89-6910. STARKS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 89-6914. MEYERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 547 N. E. 2d 265.

No. 89-6915. CAMDEN *v.* CIRCUIT COURT OF CRAWFORD COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 610.

No. 89-6921. BARCLAY *v.* MARTINEZ, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 554 So. 2d 1167.

No. 89-6922. HUNT ET AL. *v.* REYNOLDS. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1334.

No. 89-6928. COOPER *v.* MOORE, DIRECTOR OF CORRECTIONS, ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 779 S. W. 2d 636.

No. 89-6930. FRIAS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 547 N. E. 2d 809.

No. 89-6931. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1047.

No. 89-6938. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6947. FOUNTAIN *v.* WEST POINT MILITARY ACADEMY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 1043.

No. 89–6955. CUMBER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 402.

No. 89–6974. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON; DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON; and DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 89–6997. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89–7020. SWARTZ *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 1128.

No. 89–7028. FRYHOVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 1044.

No. 89–7039. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 75.

No. 89–7054. DESPAIGNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89–7067. BARBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 2d 345.

No. 89–7073. EVIDENTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1000.

No. 89–7078. FAULKNER *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1391.

No. 89–7088. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 507.

No. 89–7091. HANLEY, AKA HUNTLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89–7093. HEREAU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1571.

No. 89–7098. MUNIZ-MELCHOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1430.

No. 89–7106. BUENROSTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 135.

No. 89–7121. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 548.

No. 89–7130. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 412.

No. 87–6927. HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF SMITH *v.* TEXAS. Ct. Crim. App. Tex.;

No. 89–81. WILSON ET AL. *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir.;

No. 89–5596. LAWS, BY AND THROUGH LAWS, AS HIS NEXT FRIEND *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir.; and

No. 89–6954. MAGWOOD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 89–81, 870 F. 2d 1250.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–1067. GENERAL MOTORS CORP. *v.* WELLS ET AL. C. A. 5th Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 881 F. 2d 166.

No. 89–1159. FERRIS *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari.

No. 89–1232 (A–552). COLORADO *v.* CLEBURN. Sup. Ct. Colo. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 782 P. 2d 784.

No. 89–1272. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ET AL. *v.* SKINNER, SECRETARY OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied. JUSTICE

MARSHALL would grant certiorari. Reported below: 280 U. S. App. D. C. 262, 885 F. 2d 884.

No. 89–1419. HALIFAX HOSPITAL MEDICAL CENTER *v.* BOLT ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 891 F. 2d 810.

Rehearing Denied

No. 88–1264. SAFFLE, WARDEN, ET AL. *v.* PARKS, 494 U. S. 484;

No. 88–6613. BOYDE *v.* CALIFORNIA, 494 U. S. 370;

No. 88–7222. TASSIN *v.* LOUISIANA, 493 U. S. 874;

No. 89–1226. WALKER *v.* SUBURBAN HOSPITAL ASSN. ET AL., 494 U. S. 1056;

No. 89–5998. HAMILTON *v.* CALIFORNIA, 494 U. S. 1039;

No. 89–6395. MCCLAIN *v.* MITCHELL ET AL., 494 U. S. 1006;

No. 89–6455. IN RE WARREN, 494 U. S. 1025;

No. 89–6553. GAUNCE *v.* BURGENER ET AL., 494 U. S. 1035;

No. 89–6594. IN RE MARTIN, 494 U. S. 1025; and

No. 89–6639. KIM *v.* UNITED STATES, 494 U. S. 1037. Petitions for rehearing denied.

MAY 1, 1990

*Miscellaneous Orders**

No. A–760. SHAW *v.* ARMONTROUT, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application for a stay. I believe that the procedural posture of this case makes a stay particularly appropriate. The Court of Appeals for the Eighth Circuit affirmed the District Court's denial of Robert

*For the Court's order prescribing amendments to the Federal Rules of Criminal Procedure and abrogating the Rules of Procedure for Trial of Misdemeanors Before United States Magistrates, see *post*, p. 969.

Shaw's first federal habeas petition on March 28, 1990, and the mandate of the court issued on April 19. The very next day, the Missouri Supreme Court ordered that Shaw be executed on May 2, well before expiration of the time period during which Shaw may file a petition for writ of certiorari in this Court. Shaw then filed with the Eighth Circuit a motion to recall issuance of mandate and application for a stay of execution; the court denied both on April 30, two days prior to his scheduled execution. I believe it inappropriate to deny Shaw's application for a stay before he has a fair opportunity to file a petition for writ of certiorari in this Court.

Certiorari Denied

No. 89–7359 (A–762). TAFERO *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 561 So. 2d 557.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MAY 3, 1990

Miscellaneous Order

No. A–773. TAFERO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 10, 1990

Miscellaneous Order

No. A–785. STOKES *v.* ARMONTROUT, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 11, 1990

Miscellaneous Order. (See also No. A–795, *ante*, p. 320.)

No. A–798. STOKES *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution.

MAY 14, 1990

Certiorari Granted—Vacated and Remanded

No. 88–7070. GALLAGHER *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ojeda Rios*, *ante*, p. 257. Reported below: 870 F. 2d 652.

No. 89–479. BENITEZ ET AL. *v.* PORT AUTHORITY TRANS-HUDSON CORP. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of

Port Authority Trans-Hudson Corp. v. *Feeney*, *ante*, p. 299. Reported below: 873 F. 2d 45.

Miscellaneous Orders

No. A–752. HIRSH ET AL. *v.* CITY OF ATLANTA, GEORGIA. Super. Ct. Ga., Fulton County. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE STEVENS, concurring.

It would be irresponsible to attempt to distinguish *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977), on the basis of any difference in the content of the speech involved in that case and the content of the speech involved in this. It is entirely proper, however, to draw a distinction between injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, cf. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697–698 (1978); *United States* v. *Paradise*, 480 U. S. 149, 193 (1987) (STEVENS, J., concurring in judgment), and an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled. Cf. *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419–420 (1971); *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 162–163 (1969) (Harlan, J., concurring). I would not extend the holding in the *Skokie* case to this quite different situation. For that reason, I think the Court correctly exercises its discretion to deny the application for extraordinary relief in this case.

JUSTICE KENNEDY, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE SCALIA join, dissenting.

A Georgia trial court issued an injunction prohibiting at least one of the applicants from engaging in certain means of public protest. The Supreme Court of Georgia refused to stay the injunction pending appeal. *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977), does not distinguish among speakers based on the content of their speech. Its terms, in my view, require us to treat the stay application as a petition for certiorari, to grant certiorari, and to reverse the denial of a stay by the Supreme Court of Georgia. See *id.*, at 44. I dissent from the denial of the stay.

No. D–887. IN RE DISBARMENT OF ARAGON. Disbarment entered. [For earlier order herein, see 494 U. S. 1064.]

No. 116, Orig. ALABAMA ET AL. *v.* W. R. GRACE & CO. ET AL. Motion of New Jersey for leave to intervene as a party plaintiff denied. Motion for leave to file bill of complaint denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 89–1193. B & H INDUSTRIES OF SOUTHWEST FLORIDA, INC. *v.* DIETER ET AL. C. A. 11th Cir.;

No. 89–1499. PLAZZO ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. C. A. 6th Cir.; and

No. 89–1508. COLORADO INTERSTATE GAS CO. *v.* NATURAL GAS PIPE LINE COMPANY OF AMERICA ET AL. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–1399. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA ET AL. *v.* GEORGE ET AL. Ct. App. Cal., 4th App. Dist. Motions of World Hindu Assembly of North America et al., National Association of Evangelicals et al., and National Council of Churches of Christ in the United States et al. for leave to file briefs as *amici curiae* granted.

No. 89–1433. UNITED STATES *v.* EICHMAN ET AL. D. C. D. C. [Probable jurisdiction noted, 494 U. S. 1063]; and

No. 89–1434. UNITED STATES *v.* HAGGERTY ET AL. D. C. W. D. Wash. [Probable jurisdiction noted, 494 U. S. 1063.] Motion of Association of Art Museum Directors et al. for leave to file a brief as *amici curiae* out of time granted.

No. 89–5916. DEMAREST *v.* MANSPEAKER ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 903.] Motion for appointment of counsel granted, and it is ordered that James E. Scarboro, Esq., of Denver, Colo., be appointed to serve as counsel for petitioner in this case.

No. 89–6677. WHITE *v.* UNITED STATES. C. A. 8th Cir.;

No. 89–7025. MOUNT *v.* GORELICK ET AL. Ct. App. Cal., 6th App. Dist.; and

No. 89–7077. NICOLAISEN *v.* TOEI SHIPPING CO., LTD., ET AL. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 4,

1990, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 89–6992. IN RE JOHN. Petition for writ of mandamus denied.

No. 89–7035. IN RE SKIBO. Petition for writ of prohibition denied.

Certiorari Granted

No. 89–1008. OWEN *v.* OWEN. C. A. 11th Cir. Certiorari granted. Reported below: 877 F. 2d 44.

Certiorari Denied

No. 89–1111. BALLBE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 306.

No. 89–1179. JEROME MIRZA & ASSOCIATES, LTD. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 229.

No. 89–1192. GLINSEY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 182 Ill. App. 3d 1108, 554 N. E. 2d 1126.

No. 89–1240. THOMPSON *v.* DUKE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 1180.

No. 89–1268. HARRISINGH *v.* FOWLER. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 89–1281. BOTERO MORENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 905.

No. 89–1307. MR. W FIREWORKS, INC. *v.* DOLE, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 543.

No. 89–1321. BORN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 888 F. 2d 1165.

No. 89–1346. AUTOMOBILE CLUB OF NEW YORK, INC., ET AL. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 417.

No. 89–1364. RICHARDSON *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–1383. GRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 1411.

No. 89–1398. GEORGE *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–1420. WEINER *v.* DOUBLEDAY & CO., INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 586, 549 N. E. 2d 453.

No. 89–1438. MOUNT WASHINGTON CEMETERY ET AL. *v.* MONUMENT BUILDERS OF GREATER KANSAS CITY, INC. C. A. 10th Cir. Certiorari denied. Reported below: 891 F. 2d 1473.

No. 89–1441. INNOTRON DIAGNOSTICS *v.* ABBOTT LABORATORIES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1046.

No. 89–1442. SAVE OUR STREAMS *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89–1443. HAWLEY, INDIVIDUALLY AND AS NEXT FRIEND FOR HAWLEY, A MINOR *v.* KENDALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 892 F. 2d 76.

No. 89–1455. TRAGER, GLASS & CO. *v.* NEWMYER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 385.

No. 89–1456. PLUMBERS' PENSION FUND, LOCAL 130, U. A., ET AL. *v.* NIEDRICH ET UX. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 2d 1297.

No. 89–1460. LEBBOS *v.* SAN JOSE MUNICIPAL COURT. Sup. Ct. Cal. Certiorari denied.

No. 89–1463. EVANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 891 F. 2d 686.

No. 89–1467. WRIGHT ET AL. *v.* LAND DEVELOPERS CONSTRUCTION CO., INC. Sup. Ct. Ala. Certiorari denied. Reported below: 554 So. 2d 1000.

No. 89–1469. DRY LAND MARINA, INC. *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 175 Mich. App. 322, 437 N. W. 2d 391.

No. 89–1470. JACK *v.* CITY OF TONGANOXIE. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d 718, 779 P. 2d 34.

No. 89–1473. SALMINEN *v.* CITY OF HIBBING ET AL. Ct. App. Minn. Certiorari denied.

No. 89–1477. FIGLIUZZI ET UX. *v.* CITIBANK, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 1041.

No. 89–1479. SMITH *v.* BALTIMORE CITY POLICE DEPARTMENT ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 80 Md. App. 754.

No. 89–1480. DURAN *v.* TEXAS ET AL. Sup. Ct. Tex. Certiorari denied.

No. 89–1481. SHAT-R-SHIELD, INC. *v.* TROJAN, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 2d 1101.

No. 89–1482. LAWRENCE COAL CO. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES. Pa. Commw. Ct. Certiorari denied.

No. 89–1485. CLARK *v.* SEVENTH JUDICIAL CIRCUIT OF SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied.

No. 89–1489. CENTRAL VERMONT RAILWAY, INC. *v.* VERMONT ET AL. Sup. Ct. Vt. Certiorari denied. Reported below: 153 Vt. 337, 571 A. 2d 1128.

No. 89–1490. MARINO ET AL. *v.* ORTIZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 12.

No. 89–1491. HUGHES *v.* BUSS. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 2d 967.

No. 89–1495. NORTHWEST ADVANCEMENT, INC., ET AL. *v.* OREGON BUREAU OF LABOR ET AL. Ct. App. Ore. Certiorari denied. Reported below: 96 Ore. App. 133, 772 P. 2d 934.

No. 89–1497. SALTANY, PERSONAL REPRESENTATIVE OF THE ESTATE OF AL-ORAIBI, ET AL. *v.* REAGAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 20, 886 F. 2d 438.

No. 89–1498. NEW ORLEANS STEAMSHIP ASSN. *v.* PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 1018 and 891 F. 2d 1153.

No. 89–1504. NEWMAN *v.* QUIGG, COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 877 F. 2d 1575.

No. 89–1507. SHELBY COUNTY SHERIFF ET AL. *v.* LEACH. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 1241.

No. 89–1512. CITY OF WICHITA, KANSAS *v.* PETERSON. C. A. 10th Cir. Certiorari denied. Reported below: 888 F. 2d 1307.

No. 89–1522. PAWNEE PRODUCTION SERVICE, INC., ET AL. *v.* BAZINE STATE BANK. Sup. Ct. Kan. Certiorari denied. Reported below: 245 Kan. 490, 781 P. 2d 1077.

No. 89–1526. SOCIALIST WORKERS PARTY ET AL. *v.* HECHLER, SECRETARY OF STATE OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 890 F. 2d 1303.

No. 89–1533. STICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 89–1536. HALL, INDIVIDUALLY AND AS NEXT FRIEND OF HALL, MINOR, ET AL. *v.* CNA INSURANCE COS. ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 761 S. W. 2d 54.

No. 89–1545. QUARTERMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 275.

No. 89–1546. ADMIRAL EQUIPMENT CO. *v.* CHARLES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1094.

No. 89–1548. STAGNER *v.* UNITED STATES PATENT AND TRADEMARK OFFICE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1421.

No. 89–1552. CLAUSEN CO. *v.* DYNATRON/BONDO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 889 F. 2d 459.

No. 89–1557. SHUMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 557.

No. 89–1562. YAMAMOTO *v.* THRIFT GUARANTY CORPORATION OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 297.

No. 89–1565. PALAZZOLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 1141.

No. 89–1571. ALLEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 891 F. 2d 298.

No. 89–1583. CAMPBELL, TRUSTEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 658.

No. 89–1585. CHERRY *v.* YEUTTER, SECRETARY OF AGRICULTURE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1592. RAMIREZ *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 897 F. 2d 538.

No. 89–1600. LITTLE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1367.

No. 89–1608. MAXEY *v.* KADROVACH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 73.

No. 89–1614. LOMBARD BROTHERS, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 893 F. 2d 520.

No. 89–1615. HEFTI ET UX. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–1616. AMERICAN TECHNOLOGY RESOURCES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 651.

No. 89-1626. CLARK & WILKINS INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 80, 887 F. 2d 308.

No. 89-6243. LEAL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89-6441. VERNO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-6446. REYNOSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89-6494. ASANTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89-6495. VANOVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1117.

No. 89-6513. BAGGULEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1081.

No. 89-6596. TILLMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 525.

No. 89-6622. KLIEWER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 236 N. J. Super. 243, 565 A. 2d 706.

No. 89-6635. WHIPPLE *v.* ALEXANDER, SUPERINTENDENT, MADISON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89-6669. SPENCER *v.* SHOWERS. C. A. 7th Cir. Certiorari denied. Reported below: 893 F. 2d 1337.

No. 89-6673. GRANDISON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 143.

No. 89-6675. CURTIS *v.* ALLEN, DISTRICT DIRECTOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 1162.

No. 89-6700. FLICK *v.* BLEVINS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 887 F. 2d 778.

No. 89-6739. McKENZIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 1042.

No. 89-6743. KORNEGAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 885 F. 2d 713.

No. 89-6753. GREENE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 453.

No. 89-6764. SCOTT *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1050.

No. 89-6769. SUN *v.* WELCH ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 386 S. E. 2d 363.

No. 89-6787. HAWKINS *v.* CECO CORP. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 977.

No. 89-6797. JONES *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied.

No. 89-6858. COLLIER *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1045.

No. 89-6865. FOUST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1432.

No. 89-6876. WHEATLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 187 Ill. App. 3d 371, 543 N. E. 2d 259.

No. 89-6923. VALENCIA-ROLDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1080.

No. 89-6934. WEEKLY *v.* STORY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 408.

No. 89-6937. FRIEDMAN *v.* MONTANA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 294.

No. 89-6939. SMALLWOOD *v.* SPRINGER. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1389.

No. 89-6944. COOPER *v.* REMAX WYANDOTTE COUNTY REAL ESTATE, INC., ET AL. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d xxi, 782 P. 2d 75.

No. 89-6946. TETER *v.* JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied.

No. 89-6948. GRESHAM *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 89-6949. CURRY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 89-6951. SANDERS *v.* BORGERT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 292.

No. 89-6957. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-6958. FORTE *v.* BEERMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1327.

No. 89-6963. VAN DAAM *v.* CHRYSLER FIRST FINANCIAL SERVICES CORP. Sup. Ct. R. I. Certiorari denied. Reported below: 566 A. 2d 390.

No. 89-6968. SCIRE *v.* QUINLAN. C. A. 5th Cir. Certiorari denied.

No. 89-6969. RUSSELL *v.* MARIANI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1337.

No. 89-6970. WILLIAMS-BEY *v.* TRICKEY, DIRECTOR, DIVISION OF CLASSIFICATION AND TREATMENT, MISSOURI DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 314.

No. 89-6978. CRAMER *v.* MARINE MIDLAND BANK. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89-6979. FOX *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. C. A. 1st Cir. Certiorari denied.

No. 89-6980. JARALLAH *v.* PICKETT SUITE HOTEL ET AL. Ct. App. Ga. Certiorari denied. Reported below: 193 Ga. App. 325, 388 S. E. 2d 333.

No. 89-6981. ABBOTT *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 868.

No. 89-6982. FULFORD *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89-6987. ANDRISANI *v.* SAUGUS COLONY LTD. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6989. WILLIAMS *v.* O'LEARY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 1318.

No. 89-6993. MCKESSOR *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 246 Kan. 1, 785 P. 2d 1332.

No. 89-6994. MAYFIELD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 89-6996. KLACSMANN *v.* KLACSMANN. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89-6998. ARCE *v.* BERBARY, SUPERINTENDENT, WYOMING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 1271.

No. 89-7000. ROE *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 89-7011. WATSON ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 47 Ohio St. 3d 86, 548 N. E. 2d 210.

No. 89-7012. SHERRILLS *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1414.

No. 89-7013. LAWRENCE *v.* TEXAS EMPLOYMENT COMMISSION. Sup. Ct. Tex. Certiorari denied.

No. 89-7017. CASTILLO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89-7023. PIZANO *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1497.

No. 89-7026. FIXEL *v.* BRINKMAN, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1030, 810 P. 2d 324.

No. 89-7029. BILLINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89-7031. LIBERMAN *v.* INTERNAL REVENUE SERVICE. C. A. 2d Cir. Certiorari denied.

No. 89-7045. HINES, AKA MURRAY *v.* SHANNON. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1326.

No. 89-7049. GEBREAMLAK *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 294.

No. 89-7053. STRABLE *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 255.

No. 89-7057. FLANAGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-7058. CROSBY *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-7060. DOBRANSKI *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89-7061. HICKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 132 Ill. 2d 488, 548 N. E. 2d 1042.

No. 89-7076. MCGATHA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 1520.

No. 89-7083. RENEER *v.* DUNN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 89-7097. MONTGOMERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 531.

No. 89-7114. MARANDOLA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89-7116. SHARIF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1333.

No. 89-7117. BAASCH *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 277.

No. 89-7124. WEST *v.* MORGENTHAU, DISTRICT ATTORNEY FOR NEW YORK CITY. C. A. 2d Cir. Certiorari denied.

No. 89-7129. HAWK-BEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 263.

No. 89–7133. HOLLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1085.

No. 89–7144. SHERROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 551.

No. 89–7150. SALSMAN ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–7152. POWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 895.

No. 89–7158. URRUTIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 430.

No. 89–7168. VARGAS-GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 527.

No. 89–7169. HOMA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1089.

No. 89–7176. SANCHEZ DEFUNDORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 893 F. 2d 1173.

No. 89–7191. TEEGARDIN *v.* MEDICAL X-RAY CENTER ET AL. Cir. Ct. S. D., Minnehaha County. Certiorari denied.

No. 89–7192. LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 551.

No. 89–7194. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89–7197. LENEAR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–7198. MONTEAGUDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 89–7200. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 527.

No. 89–7204. CORTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1245.

No. 89–7217. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 1029.

No. 89–7221. JAMESON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89–7227. GARLAND *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 89–7228. DEBARDELEBEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–7231. VIZCARRA-PORRAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1435.

No. 89–7234. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 895 F. 2d 208.

No. 89–7236. WHIGHAM *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–1309. THIER *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to strike portions of the brief in opposition filed by the United States denied. Certiorari denied. Reported below: 889 F. 2d 272.

No. 89–6486. DAVIS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–6916. BALDREE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–6926. BOGGS *v.* BAIR, WARDEN, ET AL. C. A. 4th Cir.;
No. 89–7037. THOMPSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 89–7059. BECK *v.* ZANT, WARDEN. Sup. Ct. Ga.;
No. 89–7085. PARKUS *v.* MISSOURI. Sup. Ct. Mo.; and
No. 89–7214. PRUETT *v.* THOMPSON, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: No. 89–6486, 782 S. W. 2d 211; No. 89–6916, 784 S. W. 2d 676; No. 89–6926, 892 F. 2d 1193; No. 89–7037, 553 So. 2d 153; No. 89–7059, 259 Ga. 756, 386 S. E. 2d 349; No. 89–7085, 781 S. W. 2d 545.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89-7280. GOLUB *v.* IBM CORP.; GOLUB *v.* ERNST & WHINNEY ET AL.; GOLUB *v.* WEINER & CO.; and GOLUB *v.* UNIVERSITY OF CHICAGO. C. A. 2d Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 888 F. 2d 1376 (first case); 891 F. 2d 277 (second case); 896 F. 2d 543 (third case); 876 F. 2d 890 (fourth case).

Rehearing Denied

No. 88-1951. UNITED STATES *v.* DALM, 494 U. S. 596;

No. 88-7555. ROE *v.* OHIO, 494 U. S. 1060;

No. 89-937. DE KLEINMAN *v.* RESIDENTIAL BOARD OF MANAGERS OF THE OLYMPIC TOWER CONDOMINIUM ET AL., 493 U. S. 1073;

No. 89-942. ROOKER *v.* RIMER, 493 U. S. 1073;

No. 89-1034. GOLDSTEIN *v.* DELTA AIR LINES, INC., 493 U. S. 1078;

No. 89-1169. COMORA ET AL. *v.* RADELL ET AL., 494 U. S. 1028;

No. 89-1301. SAFIR *v.* UNITED STATES LINES, INC., ET AL. (two cases), 494 U. S. 1031;

No. 89-5257. JOHNSON *v.* CALIFORNIA, 494 U. S. 1038;

No. 89-5478. MOORE *v.* KENTUCKY, 494 U. S. 1060;

No. 89-6146. BLACKMON *v.* ALABAMA, 494 U. S. 1032;

No. 89-6165. LUCAS *v.* BUNNELL, WARDEN, ET AL., 494 U. S. 1032;

No. 89-6293. FERREL *v.* UNITED STATES, 494 U. S. 1032;

No. 89-6301. BOOTH *v.* K MART CORP. ET AL., 493 U. S. 1087;

No. 89-6452. BURSON *v.* SCOTT, WARDEN, 494 U. S. 1033;

No. 89-6519. MARSH *v.* UNITED STATES, 494 U. S. 1034;

No. 89-6537. LEWIS *v.* RUSSE ET AL., 494 U. S. 1035;

No. 89-6538. FIERRO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 494 U. S. 1060;

No. 89-6551. IN RE MARTIN, 494 U. S. 1025;

No. 89-6583. SMITH ET UX. *v.* SOONER FEDERAL SAVINGS & LOAN ASSN., 494 U. S. 1058;

No. 89-6595. BAKER *v.* OHIO, 494 U. S. 1058; and

No. 89-6680. RAY *v.* UNITED STATES SENATE ET AL., 494 U. S. 1069. Petitions for rehearing denied.

No. 89-1210. HARDUVEL ET AL. *v.* GENERAL DYNAMICS CORP., 494 U. S. 1030. Motion of petitioners to defer consideration of the petition for rehearing denied. Petition for rehearing denied.

MAY 16, 1990

Miscellaneous Orders

No. A-805 (89-7503). ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN with whom JUSTICE MARSHALL joins, dissenting.

I dissent from the denial of the application for stay of execution. I believe that the procedural posture of this case makes a stay particularly appropriate. This is petitioner's first petition for a writ of habeas corpus. The petition raises a substantial and recurring claim based on our decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that Texas law precluded the presentation and consideration of mitigating evidence at the sentencing phase of his trial. The petition was pending in the District Court for the Eastern District of Texas for three years before the District Court ultimately rejected petitioner's claims on March 9, 1990. After that ruling, the State immediately sought, and the trial court subsequently granted, an execution date of May 17. Such an early execution date deprived the Court of Appeals for the Fifth Circuit and this Court of the opportunity to review fully the merits of petitioner's claim. This needless burden on federal review of potentially meritorious capital claims should not be sanctioned by this Court. Even the Judicial Conference's recent proposal for streamlined review in capital cases is premised on the view that a prisoner is entitled to "one complete and fair course of collateral review in the state and federal system, *free from the time pressure of impending execution.*" Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6 (Aug. 1989) (emphasis added). Petitioner is entitled to no less today.

I would in any event grant the application for stay of execution. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

No. A–810 (89–7519). ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A–811. ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

MAY 17, 1990

Certiorari Denied

No. 89–7522 (A–813). PREJEAN *v.* WHITLEY, WARDEN. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 560 So. 2d 447.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MAY 18, 1990

Dismissal Under Rule 46

No. 89–1607. BLUE CROSS OF CALIFORNIA *v.* HUGHES. Ct. App. Cal., 1st App. Dist. Certiorari dismissed under this Court's Rule 46. Reported below: 215 Cal. App. 3d 832, 263 Cal. Rptr. 850.

MAY 21, 1990

Dismissal Under Rule 46

No. 89–1335. RECAREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 892 F. 2d 976.

Miscellaneous Orders

No. ——. WEBB *v.* THOMAS, DIRECTOR, HAMILTON COUNTY DEPARTMENT OF HUMAN SERVICES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–823. IN RE DISBARMENT OF WINTER. Disbarment entered. [For earlier order herein, see 493 U. S. 950.]

No. D–838. IN RE DISBARMENT OF ADELMAN. Disbarment entered. [For earlier order herein, see 493 U. S. 972.]

No. D–840. IN RE DISBARMENT OF PEMBERTON. Disbarment entered. [For earlier order herein, see 493 U. S. 973.]

No. D–853. IN RE DISBARMENT OF JONES. Motion to dismiss the disciplinary proceedings granted. The rule to show cause, heretofore issued on January 16, 1990 [493 U. S. 1040], is hereby discharged.

No. D–860. IN RE DISBARMENT OF HIPP. Disbarment entered. [For earlier order herein, see 493 U. S. 1067.]

No. D–861. IN RE DISBARMENT OF EISENBERG. Disbarment entered. [For earlier order herein, see 493 U. S. 1067.]

No. D–864. IN RE DISBARMENT OF ROCKER. Disbarment entered. [For earlier order herein, see 494 U. S. 1001.]

No. D–867. IN RE DISBARMENT OF DIGGES. Disbarment entered. [For earlier order herein, see 494 U. S. 1002.]

No. D–869. IN RE DISBARMENT OF BRACKEN. Disbarment entered. [For earlier order herein, see 494 U. S. 1002.]

No. D–870. IN RE DISBARMENT OF TSCHIRHART. Disbarment entered. [For earlier order herein, see 494 U. S. 1002.]

No. D–873. IN RE DISBARMENT OF SANDBORN. Disbarment entered. [For earlier order herein, see 494 U. S. 1014.]

No. D–898. IN RE DISBARMENT OF KELLY. It is ordered that Frank Allan Kelly, of Kingsport, Tenn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–899. IN RE DISBARMENT OF DONNELLY. It is ordered that Michael E. Donnelly, of Boise, Idaho, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1048. FMC CORP. *v.* HOLLIDAY. C. A. 3d Cir. [Certiorari granted, 493 U. S. 1068.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1363. UNITED STATES *v.* FRANCE. C. A. 9th Cir. [Certiorari granted, *ante*, p. 903.] Motion for appointment of counsel granted, and it is ordered that Michael R. Levine, Esq., of Honolulu, Haw., be appointed to serve as counsel for respondent in this case.

No. 89–1493. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* O'NEILL ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–5867. IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 5th Cir. [Certiorari granted, 493 U. S. 1069.] Motion of National Treasury Employees Union for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 89–7069. ETLIN *v.* ETLIN; and IN RE ETLIN. Ct. App. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 11, 1990, within which to

pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–7189. WEI *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 11, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–7341. IN RE SUN. Petition for writ of habeas corpus denied.

No. 89–7068. IN RE DOUGLASS. Petition for writ of mandamus denied.

Certiorari Denied

No. 88–2009. RICHARDSON ET AL. *v.* UNITED STEELWORKERS OF AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 1162.

No. 89–999. TERWILLIGER *v.* GREYHOUND LINES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 882 F. 2d 1033.

No. 89–1233. ESTATE OF YAEGER, BY WINTERS, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 29.

No. 89–1238. STEAD MOTORS OF WALNUT CREEK *v.* AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1200.

No. 89–1263. FISCHER ET AL. *v.* NWA, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 883 F. 2d 594.

No. 89–1276. BLOMMAERT *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 184 Ill. App. 3d 1065, 541 N. E. 2d 144.

No. 89–1280. GUERRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 906.

No. 89–1344. ENSERCH EXPLORATION, INC., MANAGING GENERAL PARTNER OF EP OPERATING CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 81.

No. 89–1357. HILL *v.* BRITT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 884 F. 2d 1318.

No. 89–1368. GULF STATES UTILITIES CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 24, 886 F. 2d 442.

No. 89–1385. JONES *v.* PSIMOS. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 1277.

No. 89–1408. TERRY ET AL. *v.* NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 1339.

No. 89–1430. APPERSON ET AL. *v.* FLEET CARRIER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1344.

No. 89–1439. CENTRAL FLORIDA CLINIC FOR REHABILITATION, INC. *v.* CITRUS COUNTY HOSPITAL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1396.

No. 89–1451. LIVENGOOD *v.* THEDFORD. C. A. 10th Cir. Certiorari denied.

No. 89–1459. LANESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 890 F. 2d 1284.

No. 89–1494. ZOLA *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 889 F. 2d 508.

No. 89–1513. MAGNUM TOWING, INC., ET AL. *v.* DADE COUNTY ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 555 So. 2d 864.

No. 89–1514. POSADA *v.* DALLAS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 89–1515. RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* SPAIN. C. A. 9th Cir. Certiorari denied.

No. 89–1519. WINTERBOURNE *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–1520. COOK INLET TRIBAL COUNCIL ET AL. *v.* CATHOLIC SOCIAL SERVICES, INC., ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 783 P. 2d 1159.

No. 89–1523. COX-UPHOFF CORP. ET AL. *v.* MENTOR CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 891 F. 2d 298.

No. 89–1524. SCHERMERHORN ET AL. *v.* ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 185 Ill. App. 3d 883, 542 N. E. 2d 42.

No. 89–1525. NOBEL-SYSCO FOODS SERVICES CO. *v.* TOLEDO. C. A. 10th Cir. Certiorari denied. Reported below: 892 F. 2d 1481.

No. 89–1534. TESLA PACKAGING INC. ET AL. *v.* RUBIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1331.

No. 89–1543. FISHER *v.* LYONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1071.

No. 89–1544. REYES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89–1554. BLACKWELDER ET AL. *v.* LIFE & HEALTH SERVICES, INC. Sup. Ct. Ala. Certiorari denied. Reported below: 554 So. 2d 329.

No. 89–1595. LEWIS *v.* VISA USA INC. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 418.

No. 89–1624. MOERING ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1338.

No. 89–1638. EWING *v.* CITYTRUST. C. A. 2d Cir. Certiorari denied. Reported below: 892 F. 2d 168.

No. 89–6430. MARIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89–6554. NEUMANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 887 F. 2d 880.

No. 89–6586. NUNEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89–6587. HINTON, AKA HAQ *v.* LEONARDO, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 277.

No. 89–6655. BAKER *v.* STICKRATH, SUPERINTENDENT, ORIENT CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 89–6767. PLATT *v.* OHIO. Ct. App. Ohio, Delaware County. Certiorari denied.

No. 89–6811. BANKS-EL *v.* CLARK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 89–6855. WILLIAMS *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 892 F. 2d 305.

No. 89–6866. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 892 F. 2d 76.

No. 89–6871. DANIEL *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1329.

No. 89–6950. LUFKIN *v.* CITY OF PADUCAH. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 127.

No. 89–6956. GAMERTSFELDER *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 524.

No. 89–6991. MIKESELL *v.* DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.

C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 409.

No. 89–7014. JONES *v.* MICHIGAN DEPARTMENT OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 89–7015. HOLOWAY *v.* EVANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–7016. LUNDY *v.* CAMBELL, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 467.

No. 89–7032. MUJICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 138.

No. 89–7033. LIND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89–7046. GRISSO *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied.

No. 89–7052. TUTTLE *v.* TUTTLE. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 535 So. 2d 276.

No. 89–7064. HAMPEL ET VIR *v.* AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–7066. GULLETT *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 308.

No. 89–7070. WILLIAMS *v.* GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 89–7072. COOPER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 558.

No. 89–7074. SHELTON *v.* PHILLUPS. C. A. 2d Cir. Certiorari denied.

No. 89–7075. SHELTON *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 89–7079. VENERI *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7082. GRIZZELL *v.* MCWHERTER, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 89–7090. HERNANDEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 89–7092. MCQUILLION *v.* MAYNARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 89–7101. CROSBY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 822, 389 S. E. 2d 207.

No. 89–7102. BROOKS *v.* FIRST BANK NATIONAL ASSN. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–7103. BREWER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 325 N. C. 550, 386 S. E. 2d 569.

No. 89–7113. IRVIN *v.* CITY OF CLARKSVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 89–7115. KOULIZOS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 897 F. 2d 539.

No. 89–7131. ADDLEMAN *v.* DOLLIVER, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 82.

No. 89–7132. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 558.

No. 89–7139. MILLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 897.

No. 89–7141. GOLDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7143. PAZ URIBE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 891 F. 2d 396.

No. 89–7145. PARROTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7161. WILSON *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89-7196. EDGINGTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 527.

No. 89-7242. LUNDSTROM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 635.

No. 89-7243. MCLAUGHLIN *v.* LATESSA. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1326.

No. 89-7244. MINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 403.

No. 89-7246. LOVINGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 75.

No. 89-7247. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89-7252. CLARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 256.

No. 89-7254. ELMENDORF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1415.

No. 89-7263. WHIRTY *v.* LATESSA, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied.

No. 89-7269. RUZZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 159.

No. 89-7270. GETER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1332.

No. 89-7283. ZUCKERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 143.

No. 89-7303. CASTILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89-7356. WILLIAMS *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89-1343. DESISTO COLLEGE, INC., ET AL. *v.* LINE ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 888 F. 2d 755.

No. 89-1510. KLEEMANN ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 890 F. 2d 698.

No. 89-1529. DOWD, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER *v.* CHITWOOD. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 889 F. 2d 781.

No. 89-1532. FLIGHT ENGINEERS' INTERNATIONAL ASSN., PAA CHAPTER, AFL-CIO *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 896 F. 2d 672.

No. 89-7216. BROWN *v.* DIXON, WARDEN. C. A. 4th Cir.; and

No. 89-7218. THOMAS *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 89-7216, 891 F. 2d 490; No. 89-7218, 891 F. 2d 1500.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88-7459. JONES *v.* SOUTH CAROLINA, 494 U. S. 1060;

No. 89-1222. AHKTAR, DBA CIRCLE MOBIL *v.* BIRD OIL CO., 494 U. S. 1030;

No. 89-1267. ROSENTHAL *v.* STATE BAR OF CALIFORNIA, 494 U. S. 1066;

No. 89-1291. MOSHKELGOSHA ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, 494 U. S. 1067;

No. 89-5624. SMITH *v.* SOUTH CAROLINA, 494 U. S. 1060;

No. 89-6333. DAVIS *v.* MISSISSIPPI, 494 U. S. 1074; and

No. 89-6633. SPIVEY *v.* KEMP, WARDEN, 494 U. S. 1074. Petitions for rehearing denied.

No. 88-6456. SAYLES *v.* CIRCUIT COURT OF BEDFORD COUNTY, VIRGINIA, 489 U. S. 1087. Motion for leave to file petition for rehearing denied.

MAY 29, 1990

Affirmed on Appeal

No. 89-1564. POOLE ET AL. *v.* GRESHAM ET AL. Affirmed on appeal from D. C. N. D. Ga.

Miscellaneous Orders

No. A-818 (89-7056). BLACKMON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending this Court's action on the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall remain in effect pending the issuance of the mandate of this Court.

No. A-822. BILCIK ET AL. *v.* UNITED STATES ET AL. Application for stay of an order of the United States District Court for the Southern District of New York, dated June 30, 1989, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-819. IN RE DISBARMENT OF CHANG. Disbarment entered. [For earlier order herein, see 493 U. S. 949.]

No. D-839. IN RE DISBARMENT OF HIGGINBOTHAM. Disbarment entered. [For earlier order herein, see 493 U. S. 973.]

No. D-856. IN RE DISBARMENT OF SANDS. Disbarment entered. [For earlier order herein, see 493 U. S. 1066.]

No. D-875. IN RE DISBARMENT OF STONER. Disbarment entered. [For earlier order herein, see 494 U. S. 1015.]

No. D-881. IN RE DISBARMENT OF SHOEMAKER. Disbarment entered. [For earlier order herein, see 494 U. S. 1053.]

No. D-883. IN RE DISBARMENT OF SINGER. Disbarment entered. [For earlier order herein, see 494 U. S. 1053.]

No. D-885. IN RE DISBARMENT OF SANDERS. Disbarment entered. [For earlier order herein, see 494 U. S. 1053.]

No. D-900. IN RE DISBARMENT OF SKEVIN. It is ordered that John M. Skevin, of Hackensack, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–901. IN RE DISBARMENT OF OLSTER. It is ordered that Bruce A. Olster, of Green Pond, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–902. IN RE DISBARMENT OF METZ. It is ordered that William A. Metz, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–903. IN RE DISBARMENT OF HAGMAN. It is ordered that Gary L. Hagman, of Weatherford, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–1916. MINNESOTA *v.* OLSON, *ante*, p. 91. Motion of petitioner respecting the mandate and judgment of this Court denied.

No. 89–1563. WILLIAMS ET AL. *v.* STONE. C. A. 2d Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted.

No. 89–6702. CARTER *v.* NESBY ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 19, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–7211. IN RE BEAS. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–1555. DENNIS *v.* HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL. Sup. Ct. Neb. Certiorari granted. Reported below: 234 Neb. 427, 451 N. W. 2d 676.

No. 89–1391. RUST ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES; and

No. 89–1392. NEW YORK ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 889 F. 2d 401.

No. 89–7272. HARMELIN *v.* MICHIGAN. Ct. App. Mich. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question III presented by the petition. Reported below: 176 Mich. App. 524, 440 N. W. 2d 75.

Certiorari Denied

No. 89–894. CONNOLLY, SECRETARY OF STATE OF MASSACHUSETTS, ET AL. *v.* SECURITIES INDUSTRY ASSN. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 883 F. 2d 1114.

No. 89–1191. EVANS ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1007.

No. 89–1218. DOE, AS NEXT BEST FRIEND OF DOE, A MINOR *v.* BOBBITT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 2d 510.

No. 89–1313. BROSS *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 1256.

No. 89–1349. 110–118 RIVERSIDE TENANTS CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 514.

No. 89–1371. DAVID R. WEBB CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 888 F. 2d 501.

No. 89–1380. CRIDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 294.

No. 89–1395. BARNHART *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 295.

No. 89–1397. GARZA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 55.

No. 89–1412. KAUFMAN ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 446.

No. 89–1458. MANNHEIM VIDEO, INC. *v.* COOK COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 1043.

No. 89–1472. ACW AIRWALL, INC., ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. Reported below: 891 F. 2d 967.

No. 89–1483. RAMIREZ *v.* OREGON STATE BAR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1089.

No. 89–1516. HARRIS, GOVERNOR OF GEORGIA, ET AL. *v.* LUCKEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 860 F. 2d 1012.

No. 89–1530. PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT *v.* ARMY CORPS OF ENGINEERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1092.

No. 89–1547. SALMINEN *v.* TERRY, SPECIAL ADMINISTRATRIX OF THE ESTATE OF STEIN, ET AL. Ct. App. Minn. Certiorari denied.

No. 89–1551. POGUE *v.* WHITE STONE BAPTIST CHURCH ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 554 So. 2d 981.

No. 89–1553. UNDERWOOD *v.* SERVICEMEN'S GROUP INSURANCE. C. A. 10th Cir. Certiorari denied. Reported below: 893 F. 2d 242.

No. 89–1558. STEPHENS ET AL. *v.* MCKINNEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 890 F. 2d 1166.

No. 89–1561. CAMPBELL, ADMINISTRATRIX OF THE ESTATE OF CAMPBELL *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 520.

No. 89–1579. GRIFFING *v.* CHILDREN'S HOME SOCIETY OF FLORIDA, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 554 So. 2d 1.

No. 89–1639. APPLEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89–1649. ISIBOR *v.* BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 290.

No. 89–1663. FIUMARA *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 889 F. 2d 254.

No. 89–1668. STANFIELD *v.* HORN ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 89–1669. GRECO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 1141.

No. 89–1673. POPE *v.* BOND ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–1692. D'OTTAVIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89–1700. PARKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 908.

No. 89–5493. GRIFFIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 655.

No. 89–5727. SIMPSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 885 F. 2d 36.

No. 89–5896. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89–6072. CAULK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 263.

No. 89–6134. ACOSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89–6282. HERRADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 524.

No. 89-6287. BURKS *v.* UNITED STATES; CANNON *v.* UNITED STATES; and PUSKAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1379 (first case), 1382 (second case), and 1383 (third case).

No. 89-6414. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 261.

No. 89-6429. NEWMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 88.

No. 89-6692. GRIFFITH *v.* ROLFS, SUPERINTENDENT, TWIN RIVERS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89-6792. DUNCAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 89-6794. GRANCORVITZ *v.* COOKE, SUPERINTENDENT, KETTLE MORAINE CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 890 F. 2d 34.

No. 89-6837. NETTLES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 87.

No. 89-6860. THOMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 186 Ill. App. 3d 782, 542 N. E. 2d 881.

No. 89-6887. TERRELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 132 Ill. 2d 178, 547 N. E. 2d 145.

No. 89-6899. SANTOYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 726.

No. 89-6920. STULL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89-6924. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 404.

No. 89-6925. SAVAGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 888 F. 2d 528.

No. 89-6942. SILVERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89–6945. PINELLI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 1461.

No. 89–6972. LAKE *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 89–7009. CASTILLO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 900 F. 2d 246.

No. 89–7084. SHARP *v.* KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 89–7086. SMALLEY *v.* CONROY. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1382.

No. 89–7089. RENTSCHLER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 89–7096. LYNCH *v.* PEARCE ET AL.; and LYNCH *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 334.

No. 89–7099. HORNER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 183 Ill. App. 3d 1113, 556 N. E. 2d 1310.

No. 89–7107. AUSTIN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 89–7109. ALLUSTIARTE ET AL. *v.* COOPER. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1094.

No. 89–7111. ALLUSTIARTE ET AL. *v.* COOPER. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1094.

No. 89–7112. WALKER *v.* CADILLAC MOTOR CAR DIVISION ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 46 Ohio St. 3d 703, 545 N. E. 2d 1280.

No. 89–7118. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7119. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 609, 569 A. 2d 1368.

No. 89–7123. FRIEDMAN *v.* NEW YORK CITY DEPARTMENT OF HOUSING AND DEVELOPMENT ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 890.

No. 89–7125. R. P. Z. *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 262.

No. 89–7126. MARTIN *v.* SHANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1367.

No. 89–7127. LEPISCOPO *v.* PENITENTIARY HOSPITAL OF NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 109 N. M. 631, 788 P. 2d 931.

No. 89–7128. ROBINSON *v.* DUBINA ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 49 Ohio St. 3d 713, 552 N. E. 2d 950.

No. 89–7135. BARNTHOUSE *v.* JACKSON, FKA BARNTHOUSE. Ct. App. Colo. Certiorari denied.

No. 89–7137. LECHIARA *v.* MILLER ET AL. Cir. Ct. Monongalia County, W. Va. Certiorari denied.

No. 89–7140. PUGH *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 1163.

No. 89–7142. HOWARD *v.* PLUCKETT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 411.

No. 89–7147. CHISLER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 654.

No. 89–7148. SALMON *v.* CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied.

No. 89–7151. RICHARDSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 89–7155. SMITH *v.* ALEXANDER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 399.

No. 89–7162. BARHAM *v.* POWELL, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 895 F. 2d 19.

No. 89–7171. ISMAIL *v.* OLD KENT BANK & TRUST CO. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1334.

No. 89–7177. GAFFORD *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 89–7209. DEMOS *v.* GARDNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–7256. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7257. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 140.

No. 89–7288. KEATON *v.* FREESTONE COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–7311. SIMMONS *v.* HOLSEY TEMPLE CHRISTIAN METHODIST EPISCOPAL CHURCH ET AL. Ct. App. Ga. Certiorari denied. Reported below: 193 Ga. App. 770, 389 S. E. 2d 1.

No. 89–7316. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7330. MACKBEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1057.

No. 89–7331. MIRANDA-HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7346. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 705.

No. 89–7351. TERRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 556.

No. 89–7352. WESLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1415.

No. 89–7363. MCCABE *v.* CALLAHAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 994.

No. 89–1216. PORT SHIP SERVICE, INC. *v.* NORTON LILLY & CO., INC. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 883 F. 2d 23.

No. 89–6264. WHITE *v.* TEXAS. Ct. Crim. App. Tex.;

No. 89–6814. STEWART *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 89-6841. VALDEZ *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89-6875. BELL *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89-6882. ROBERTS *v.* GEORGIA. Sup. Ct. Ga.; and
No. 89-7048. CARGILL *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 89-6264, 779 S. W. 2d 809; No. 89-6814, 877 F. 2d 851; No. 89-6841, 776 S. W. 2d 162; No. 89-6875, 49 Cal. 3d 502, 778 P. 2d 129.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89-6484. GRANVIEL *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 185.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case raises the question whether an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is satisfied by court appointment of a psychiatrist whose examination report is available to both the defense and prosecution. The Fifth Circuit, on habeas review, held that such an appointment is sufficient. *Granviel* v. *Lynaugh*, 881 F. 2d 185 (1989). This ruling is squarely inconsistent with our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), that a State must provide an indigent defendant a psychiatrist to assist in preparing and presenting his defense. *Ake* mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system. To allow the prosecution to enlist the psychiatrist's efforts to help secure the defendant's conviction would deprive an indigent defendant of the protections that our adversarial process affords all other defendants.

Kenneth Granviel was tried for capital murder in 1983. Prior to trial, Granviel requested that the court appoint a mental health expert to help him prepare an insanity defense. He specifically asked that the expert's report not be made available to the prosecution. The trial court denied petitioner's request for confidential expert assistance; it did, however, appoint a disinterested ex-

pert whose report would go to both the defense and prosecution, as authorized by Tex. Code Crim. Proc. Ann., Art. 46.03(3) (Vernon 1979 and Supp. 1990). That statute provides:

> "(a) If notice of intention to raise the insanity defense is filed . . . , the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.
>
> "(b) The court may order any defendant to submit to examination for the purposes described in this article. . . .
>
> "(c) The court shall advise any expert appointed pursuant to this section of the facts and circumstances of the offense with which the defendant is charged and the elements of the insanity defense.
>
> "(d) A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney."

See also Art. 46.02 (providing for court appointment of expert to determine defendant's competency to stand trial). Pursuant to this law, the court also allowed the prosecution, over Granviel's objection, to rebut Granviel's evidence of insanity with the report of a psychiatrist appointed at Granviel's request.

In *Ake*, we held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense.*" 470 U. S., at 83 (emphasis added). *Ake* was concerned not with establishing a procedure whereby an independent examiner could determine the validity of a defendant's insanity defense and present his findings to both parties and to the court. Rather, *Ake* was directed at providing a defendant with the tools necessary to present an effective defense within the context of our adversarial system, in which each party marshals evidence favorable to its side and aggressively challenges the evidence presented by the other side. In that adversarial system, "the psychiatrists for each party enable the

[court or] jury to make its most accurate determination of the truth on the issue before them." *Id.*, at 81. Thus, we recognized in *Ake* that a defense psychiatrist is necessary not only to examine a defendant and to present findings to the judge or jury on behalf of the defendant, but also to "assist in preparing the cross-examination of a State's psychiatric witnesses," *id.*, at 82, and in determining "how to interpret their answers," *id.*, at 80. Just as an indigent defendant's right to legal assistance would not be satisfied by a State's provision of a lawyer who, after consulting with the defendant and examining the facts of the case and the applicable law, presented everything he knew about the defendant's guilt to the defendant, the prosecution, and the court, so his right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court.

Ake's requirement of psychiatric assistance does not mean that a defendant can shop around for a psychiatrist "of his personal liking" or "receive funds" from the State to hire a psychiatrist on his own. *Id.*, at 83. The trial court retains the authority to choose the psychiatrist, as long as that psychiatrist is competent. Nevertheless, the function of the psychiatrist chosen by the court is still to assist the defendant in preparing and presenting his defense. Of course, *Ake* does not guarantee a psychiatrist "who will reach biased or only favorable conclusions." 881 F. 2d, at 192. If the psychiatrist appointed to assist the defendant determines that the defendant was not insane at the time of the offense, he probably will not be able to provide much helpful testimony for the defense on the insanity issue. But the psychiatrist's determination may not be revealed to the prosecution for use as evidence any more than may the results of the investigation and research of the defendant's court-appointed lawyer.

Texas' provision of a "disinterested" expert thus does not satisfy *Ake*. Texas may, of course, provide for appointment of such an expert to aid the factfinder in determining the validity of a defendant's insanity defense. Cf. Fed. Rule Evid. 706. Such an appointment, however, must supplement—not take the place of—appointment of a psychiatrist to assist the defendant in preparing and presenting his defense.

Granviel is entitled to a new trial because he was deprived of the assistance required under *Ake*. Furthermore, as this result is dictated by *Ake*, which we decided before petitioner's conviction became final, Granviel's claim is not barred by this Court's deci-

sion in *Teague* v. *Lane*, 489 U. S. 288, 301 (1989). Because the Fifth Circuit's misinterpretation of *Ake* substantially undermines an indigent defendant's ability to present an effective defense, I would grant the petition to reaffirm our holding in *Ake*. Even if Granviel did not have a meritorious *Ake* claim, I would grant the petition and vacate petitioner's death sentence on the ground that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting).

No. 89–7120. WILLARD *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 3d Cir. Certiorari before judgment denied.

Rehearing Denied

No. 89–527. CALLAHAN, SUPERINTENDENT, MCNEIL ISLAND CORRECTION FACILITY *v.* ROBTOY; and DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY *v.* NORMAN, 494 U. S. 1061;

No. 89–6518. LINDSEY *v.* LOUISIANA, 494 U. S. 1074; and

No. 89–6636. SHERRILLS *v.* PERINI, 494 U. S. 1068. Petitions for rehearing denied.

JUNE 3, 1990

Miscellaneous Order. (See No. A–857, *ante*, p. 731.)

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE AND ABROGATION OF RULES OF PROCEDURE FOR TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

The following amendments to the Federal Rules of Criminal Procedure and abrogation of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates were prescribed by the Supreme Court of the United States on May 1, 1990, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 968. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments and abrogation shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, and 490 U. S. 1135.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MAY 1, 1990

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. You will note that the Court has not adopted the addition of a subsection (3) to Rule 41(a) which had been recommended by the Judicial Conference of the United States. The Court is of the view that this proposal requires further consideration.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MAY 1, 1990

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 5(b), 41(a), 54(b)(4), and (c), and new Rule 58 as hereinafter set forth:

[See *infra*, pp. 971–976.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1990 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, promulgated April 14, 1980, as amended, are hereby abrogated, effective December 1, 1990.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure and the abrogation of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial appearance before the magistrate.

. . . . .

(*b*) *Misdemeanors and other petty offenses.*—If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate under 18 U. S. C. § 3401, the magistrate shall proceed in accordance with Rule 58.

Rule 41. Search and seizure.

(*a*) *Authority to issue warrant.*—Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

Rule 54. Application and exception.

. . . . .

(*b*) *Proceedings.*

. . . . .

(*4*) *Proceedings before United States magistrates.*—Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.

. . . . .

(*c*) *Application of terms.*

. . . . .

"Petty offense" is defined in 18 U. S. C. § 19.

. . . . .

Rule 58. Procedure for misdemeanors and other petty offenses.

(*a*) *Scope.*

(*1*) *In general.*—This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to judges of the district courts in such cases tried by magistrates.

(*2*) *Applicability of other federal rules of criminal procedure.*—In proceedings concerning petty offenses for which no sentence of imprisonment will be imposed the court may follow such provisions of these rules as it deems appropriate, to the extent not inconsistent with this rule. In all other proceedings the other rules govern except as specifically provided in this rule.

(*3*) *Definition.*—The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U. S. C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.

(*b*) *Pretrial procedures.*

(*1*) *Trial document.*—The trial of a misdemeanor may proceed on an indictment, information, or complaint or, in the case of a petty offense, on a citation or violation notice.

(*2*) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

(A) The charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U. S. C. § 3013, and restitution under 18 U. S. C. § 3663;

(B) the right to retain counsel;

(C) unless the charge is a petty offense for which appointment of counsel is not required, the right to request the assignment of counsel if the defendant is unable to obtain counsel;

(D) the right to remain silent and that any statement made by the defendant may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a judge of the district court, unless the defendant consents to trial, judgment, and sentencing before a magistrate;

(F) unless the charge is a petty offense, the right to trial by jury before either a magistrate or a judge of the district court; and

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary examination in accordance with 18 U. S. C. § 3060, and the general circumstances under which the defendant may secure pretrial release.

(*3*) *Consent and arraignment.*

(*A*) *Trial before a magistrate.*—If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea. The defendant may plead not guilty, guilty, or with the consent of the magistrate, nolo contendere.

(*B*) *Failure to consent.*—If the defendant does not consent to trial before the magistrate, the defendant shall be ordered to appear before a judge of the district court for further proceedings on notice.

(*c*) *Additional procedures applicable only to petty offenses for which no sentence of imprisonment will be imposed.*—With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable:

(*1*) *Plea of guilty or nolo contendere.*—No plea of guilty or nolo contendere shall be accepted unless the court is satisfied

that the defendant understands the nature of the charge and the maximum possible penalties provided by law.

(2) *Waiver of venue for plea and sentence.*—A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of the same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) *Sentence.*—The court shall afford the defendant an opportunity to be heard in mitigation. The court shall then immediately proceed to sentence the defendant, except that in the discretion of the court, sentencing may be continued to allow an investigation by the probation service or submission of additional information by either party.

(4) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal including any right to appeal the sentence. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence.

(d) *Securing the defendant's appearance; payment in lieu of appearance.*

(1) *Forfeiture of collateral.*—When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable cases in lieu of appearance and as authorizing the termination of the proceedings. Local rules may make provision for increases in fixed sums not to exceed the maximum fine which could be imposed.

(2) *Notice to appear.*—If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address.

(3) *Summons or warrant.*—Upon an indictment or a showing by one of the other documents specified in (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty for perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.

(e) *Record.*—Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound equipment.

(f) *New trial.*—The provisions of Rule 33 shall apply.

(g) *Appeal.*

(1) *Decision, order, judgment or sentence by a district judge.*—An appeal from a decision, order, judgment or conviction or sentence by a judge of the district court shall be taken in accordance with the Federal Rules of Appellate Procedure.

(2) *Decision, order, judgment or sentence by a magistrate.*

(A) *Interlocutory appeal.*—A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order

from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(*B*) *Appeal from conviction or sentence.*—An appeal from a judgment of conviction or sentence by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(*C*) *Record.*—The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly to the clerk of court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit the inability to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(*D*) *Scope of appeal.*—The defendant shall not be entitled to a trial de novo by a judge of the district court. The scope of the appeal shall be the same as an appeal from a judgment of a district court to a court of appeals.

(*3*) *Stay of execution; release pending appeal.*—The provisions of Rule 38 relating to stay of execution shall be applicable to a judgment of conviction or sentence. The defendant may be released pending appeal in accordance with the provisions of law relating to release pending appeal from a judgment of a district court to a court of appeals.

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